155-394

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 101.

ROBERT T. SWAN, TRUSTEE, APPELLANT,

vs.

JOHN HILL, A. B. WILD, S. B. CURTIS, AND SAMUEL SUMMERS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MARCH 17, 1891.

(14,522.)

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1-3 In the District Court of the First Judicial District of Arizona in and for Cochise County.

JOHN HILL, A. B. WILD, S. B. CURTIS, and SAMUEL SUMMERS
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP KEE, a Chinaman, and The Boston Mining and Reduction Company, a Corporation.

Plaintiffs complain of defendants and allege:

I.

That the Boston Mining and Reduction Company is, as plaintiffs is informed and believes, a corporation duly organized under the laws of the State of Connecticut, and has its principal office and owns property and is doing business in Cochise county,
4 Arizona, and that N. W. Storer is its duly and legally appointed resident agent, and that plaintiffs and all of the other defendants above named reside in Cochise county, Arizona.

II.

That in the year 1877 The Contention Consolidated Mining Company, a corporation, and plaintiffs and their predecessors and grantors in interest erected a dam across the San Pedro river, in Cochise county, Arizona, above the town known as Contention City, and dug from said dam a ditch or canal now known as the Union ditch, five feet wide at the bottom and of sufficient depth to carry all the water which would pass through their head-gate, which was and is placed at the head of said ditch where it leaves the river without pressure, said head-gate being in dimensions five feet wide by eighteen inches high, and that by means of said dam and ditch diverted from said river such an amount of water as would pass through said head-gate without pressure and conveyed and conducted the same by means thereof and various other lateral ditches from said main ditch on to the lands of these plaintiffs, and appropriated said amount of water, the same being necessary to irrigate 640 acres of land owned by plaintiffs, and to run the quartz mill of said Contention Consolidated Mining Company. That said appropriation was made at the time
5 aforesaid for the purpose of irrigating the lands of plaintiffs and their predecessors and grantors, and for the purpose of running said quartz mill and that without such irrigation plaintiffs' said lands are entirely worthless. That plaintiffs are farmers and rely on the cultivation of their lands which lie along and contiguous to said ditch for the support of their families and themselves. That they own 640 acres of land under said ditch and are cultivating the same and that they are entitled to such an amount of water as is necessary for its irrigation, that they own an undivided half interest in said dam and ditch and in the waters that

will flow through their said head-gate without pressure, and that said Contention Consolidated Company own the other half interest, and that all of the waters that will flow through said head-gate under the conditions above named are necessary for the irrigation of their said lands and the use of said quartz mill. That since their rights have attached and their appropriation as aforesaid has been made, and while plaintiffs were in actual use of the waters aforesaid the defendants and those under whom they claim have constructed various dams and ditches above them in the San Pedro river, in Cochise county, and have diverted and are now diverting large quantities of water from said river, thereby diminish-
6 ing the natural flow of the water in the bed of said river so that in the dry seasons of the year and right now plaintiffs have been and are deprived of the use of any water that will do their crops any good, and by reason thereof their crops are dying, their fields going to waste and their labor rendered futile. That the uninterrupted flow of the waters of the San Pedro are now absolutely necessary to the preservation of their crops now growing on their lands and that unless they get the amount claimed herein they will be irreparably injured and damaged. That defendants are now diverting said waters from said river and threaten to and will continue so to do unless enjoined by this court, and that plaintiffs have no adequate practical and efficient remedy at law against the injury and damage being thus done them.

Wherefore plaintiffs pray a judgment and decree of this court establishing their right and title in connection with said Contention Consolidated Mining Company to so much water as will flow through their head-gate, five feet wide by eighteen inches high, without pressure, and so much as is necessary to irrigate 640 acres of land, and for an injunction restraining defendants and each of them from further diverting said waters of said San Pedro river to the injury of plaintiffs or from further maintaining their
7 several dams across said river, and for costs of suit and such other relief, legal, equitable or general, as may be proper.

GOODRICH & STREET,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Samuel Summers, being duly sworn, says: That I am one of the plaintiffs in the above-entitled action, that I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge except the matters therein stated on information and belief, and that as to those matters I believe it to be true.

SAMUEL SUMMERS.

Subscribed and sworn to before me this June 11th, 1888.

[SEAL.] ALLEN R. ENGLISH,
Notary Public.

It satisfactorily appearing to me from the foregoing complaint that this is a proper case for an injunction and that the same ought

to issue, ordered: That upon plaintiffs filing a good and sufficient bond herein, to be approved by the clerk of this court, in the sum of $800, that a temporary injunction issue out of and under the seal of this court directed to the defendants within named,
8 commanding each and every of them to desist and refrain from using or diverting any of the waters from the San Pedro river while a less amount of said waters are flowing through the plaintiffs' head-gate, in dimensions 5 feet wide by 18 inches high, than is sufficient to fill the same and keep the said gate full without pressure.

Dated June 11th, A. D. 1888.

JAMES REILLY,
Court Commissioner.

No. 1308. Filed June 11th, 1888, at 11 o'clock a. m.
GEO. H. DAILY, *Clerk.*

In the District Court, First Judicial District, Cochise County, Arizona.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP LEE, a Chinaman, and The Boston Mining and Reduction Company, a Corporation.

TERRITORY OF ARIZONA, }
County of Cochise. }

9 N. W. Storer, being first duly sworn, deposes and says that the above-named defendant, The Boston Mining and Reduction Company, a corporation, has ceased to do businsss of any sort in the Territory of Arizona; that said corporation has no property or interest in property of any sort in the county of Cochise, Territory of Arizona; that said corporation formerly owned certain real estate, water rights and mining premises in said county, all of which interests were, on or about the 26th day of March, 1888, conveyed to Robert T. Swan, which deed of conveyance is duly recorded in the records of the county of Cochise, on page 56, Book 1, of Trust Deeds, which record was duly made on the 24th day of April, 1888, which records are hereby referred to and made a part hereof; that at the time of said sale and transfer of said interests by said corporation, defendant, said corporation ceased to do business in said county and Territory, and said corporation has not used any water of the San Pedro river, in Cochise county, for any purpose whatever since the date of said sale and conveyance; that affiant is the agent of R. T. Swan, above mentioned, in charge of the land, water rights and premises formerly owned by the said Boston Mining and Reduction Company; that affiant has in no manner or extent been representing said defendant corporation, as agent or otherwise, since the 24th day of April, A. D. 1888.

10 Wherefore affiant asks to be discharged from the order made in the above-entitled case and served on affiant to show cause why affiant should not be held for contempt of court.

N. W. STORER.

Subscribed and sworn to before me this 22nd day of June, 1888.

[SEAL.] H. G. HOWE,
Notary Public.

Filed June 22, 1888, at 2 o'clock p. m.

GEO. H. DAILY, *Clerk.*

In the District Court, First Judicial District of Arizona, in and for Cochise County.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.*

By consent of all parties it is hereby ordered that W. W. Woodman be and he is hereby appointed commissioner to distribute the waters of the San Pedro river between the parties to this action—so that plaintiffs shall first have all the water necessary to irrigate their lands in cultivation, not to exceed the quantity allowed plaintiffs in the writ of injunction, and that after allowing plaintiffs sufficient water to irrigate their said cultivated lands to give the
11 defendants a sufficient amount to irrigate their cultivated lands, if a sufficiency for that purpose remains.

To continue till further order of court.

WM. W. PORTER,
Associate Justice.

Filed June 23d, 1888, at 10 o'clock a. m.

GEO. H. DAILY, *Clerk.*

In the District Court, Second Judicial District of Arizona, in and for Cochise County.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.* } No. 1308.

Now come the plaintiffs in the above-entitled cause and amend their original complaint in said cause filed, and for amendment say: They strike out the whole of the second paragraph of said original complaint and substitute in lieu thereof the following, viz:

II.

That in the year 1877 plaintiffs and their predecessors and grantors in interest erected a dam across the San Pedro river, in Cochise county, Arizona, just above Contention City, and dug from said dam a ditch, now known as the Union ditch, five feet wide at the

bottom and of sufficient depth to carry all the water that
12 would pass through their head-gate, which was placed at the head of said ditch when it leaves the river, said head-gate being in dimensions five feet wide by eighteen inches in depth, and that by means of said dam and ditch diverted from said river such an amount of water as would pass through said head-gate and conveyed the same by means thereof and various other lateral ditches from said main ditch on to the lands of these plaintiffs and appropriated said amount of water, the same being necessary to irrigate the 640 acres of land owned by plaintiffs. That said appropriation was made at the time aforesaid for the purpose of irrigating the said lands, and that without such irrigation plaintiffs' said lands are entirely worthless. That plaintiffs are farmers and rely on the cultivation of their lands, which lie along and contiguous to said ditch, for the support of their families and themselves.

That they own 640 acres of land under said ditch and are and have long been cultivating the same and are entitled to such an amount of water from said river as is necessary for the irrigation of said land. And that all of the waters that will flow through said head-gate *is* necessary for the irrigation of their said lands.

III.

That since plaintiffs' rights have attached and their appro-
13 priations aforesaid had been made and while plaintiffs were in the actual use of the water aforesaid, the defendants and those under whom they claim have constructed various dams and ditches above plaintiffs' said dam on the San Pedro river and have diverted and were at the time said original complaint was filed diverting and now are diverting large quantities of water from said river, thereby greatly diminishing the flow of the waters of said river, so that in the dry seasons of the year and especially during the time intervening between about the middle of April and the middle of July in each year plaintiffs are and were deprived of the use of such an amount of water as would do their crops any good, and that by reason of the diversion of the water aforesaid plaintiffs' crops at the time their original complaint was filed were and are now dying, their fields going to waste and their labor rendered futile.

That the uninterrupted flow of the waters of the San Pedro river are now and were at the time of the entry of their original complaint absolutely necessary to the preservation of plaintiffs' crops, then and now growing on plaintiffs' said lands.

IV.

That unless plaintiffs can have the amount of water claimed herein they will be irreparably injured and damaged.

14 V.

That defendants were when their original complaint was filed and now are diverting said waters from said river and threaten to

and will continue to so divert the same unless enjoined by this court from so doing.

VI.

Plaintiffs have no adequate practical remedy at law against the injury and damage thus done and threatened them.

Wherefore plaintiffs pray a judgment and decree of this court establishing their right and title to so much water as will flow through their headgate, five feet wide by eighteen inches in depth, and so much as is necessary to irrigate 640 acres of land, and for an injunction perpetually restraining defendants and each of them from further diverting the waters from said San Pedro river to the injury of plaintiffs, and from maintaining any dam, dams or other obstructions across said river to the injury of plaintiffs' said rights, and for costs of suit and for equitable, general and proper relief.

GOODRICH & STREET,
Attorneys for Plaintiffs.

Amended complaint filed June 20, 1889.

GEO. H. DAILY, *Clerk.*

15 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP LEE, a Chinaman, and The Boston Mining and Reduction Company, a Corporation.

Defendants, Peter Crane and Carter Crane, appearing herein by their attorneys, Herring & Herring, demur to the complaint of plaintiffs on the ground that said complaint does not state facts sufficient to constitute a cause of action.

Defendants, for their answer to the complaint of plaintiffs, allege that for more than five years before the commencement of this action they have been in the peaceable and adverse possession of a sufficient quantity of the waters of the San Pedro river, flowing to the lands occupied and used by them for agricultural purposes, being in extent about three hundred and twenty acres, necessary to irrigate the same; and that during the said period of five years defendants have been using and enjoying the said water right, and that the same has constituted a material part of the value of their property and estate upon which they have, during said period,
16 paid taxes, and that defendants have been so using, enjoying and claiming said water during said period under a deed duly entitled to be registered.

Defendants further allege that during the period of five years plaintiffs had actual knowledge that defendants were claiming, using and enjoying the said water, as above described, adversely to any right or property therein or appropriation thereof by plaintiffs or their predecessors or grantors, and defendants plead the statute

of limitations of this Territory, section 3, chapter 1, title XLIV, of the Revised Statutes as a bar to any recovery on the part of plaintiffs, or either of them, against defendants of the waters aforesaid, or any right or interest therein used and claimed by defendants as aforesaid. Defendants further show that their adverse use and enjoyment of said water for said period of five years has been continuous and uninterrupted.

II.

Defendants, for a further answer and defense to complaint of plaintiffs, allege that they are in possession of the water and right to use the same, flowing in the San Pedro river, sufficient in quantity to irrigate the lands and premises occupied and used by defendants for purposes of cultivating the lands occupied by them, being about three hundred and twenty acres, and defendants claim said
17 water and right to use the same by right of possession, and that they have claimed said right of possession for more than two years before the commencement of this action; that said right has been claimed, possessed and exercised for said period continuously and uninterruptedly, adversely to plaintiffs and with their knowledge, and defendants plead the statute of limitations of the Territory, being section 5, chapter 1, title XLIV, of the Revised Statutes, as a bar to any recovery on the part of plaintiffs, or either of them, against these defendants, of the waters aforesaid, or any right or interest therein used, claimed and possessed by defendants as aforesaid.

III.

Defendants deny that plaintiffs and the Contention Consolidated Mining Company, or their grantors or predecessors in interest, have, at the time stated in plaintiffs' complaint, or at any other time, appropriated the quantity of water in the San Pedro river flowing to their dam, sufficient to fill the head-gate of their ditch, as described in said complaint, and to run the quartz mill of said company, and defendants deny that any appropriation of the waters of the San Pedro river were ever made by plaintiffs and their predecessors and grantors for the purpose of irrigating the lands of plaintiffs and for the purpose of running the quartz
18 mill of said Contention Consolidated Mining Company, but defendants show, on the contrary, that whatever quantity of water of said river was appropriated at any time by plaintiffs was appropriated solely for the purpose of irrigating the lands which plaintiffs owned at the time of their appropriation of said water, and defendants deny that at the time plaintiffs constructed their dam and ditch they appropriated sufficient water to irrigate six hundred and forty acres of land, nor was the amount of water claimed to have been appropriated by plaintiffs necessary, nor is such amount of water now necessary for the purpose of irrigating six hundred and forty acres of land, and defendants deny that plaintiffs are now, or ever have been, in the possession of, or do now own, or have at any time owned or controlled six hundred and

forty acres of arable land along said San Pedro river which could be cultivated by irrigating the same from the waters conducted from said river by said Union ditch; nor have plaintiffs six hundred and forty acres along said river under cultivation by means of irrigating the same from the waters conveyed from said river by means of their dam and ditch.

IV.

Defendants deny that plaintiffs are entitled to such an amount of water as will irrigate six hundred and forty acres of land, and defendants deny that plaintiffs are the owners of an
19 undivided half interest in the dam and ditch and the water flowing through their said head-gate described in plaintiffs' complaint. Nor is the Contention Consolidated Mining Company the owner of the other half interest therein, and defendants show in such respect, they take their objection to plaintiffs' complaint by way of answer, for the reason that the fact does not appear upon the face of the complaint, that plaintiffs have no privity or unity of interest whatever in the said dam or ditch or the waters diverted thereby, and are not jointly the owners of an undivided one-half interest therein or of any interest therein and are therefore improperly joined as parties plaintiff herein.

V.

Defendants deny that since the rights of plaintiffs have attached, and their appropriation of the water has been made, or that while plaintiffs were in the actual use of said water, that defendants or any one under whom they claim, have constructed any ditches or dams above plaintiffs on the San Pedro river, in Cochise county, and are thereby diminishing the natural flow of the water in the bed of said river, and defendants allege in such behalf that only such dam and ditches have been constructed by them or their grantors, as will divert the water of the river the right to which was acquired prior to plaintiffs' right.

20 VI.

Defendants for a further answer and defense to the complaint of plaintiffs allege that they are the owners of about three hundred and twenty acres of arable land upon the San Pedro river, in Cochise county, lying above the dam and ditch of plaintiffs, and that prior to the appropriation by plaintiffs or the Contention Consolidated Mining Company, or the grantors or predecessors in interest of either of them, of any of the water of the San Pedro river, defendants and their grantors and predecessors in interest appropriated a sufficient quantity of water of said river for the purpose of irrigating the aforesaid arable lands along said river, which amount of water is required and necessarily used by defendants in irrigating their said arable and irrigable lands along said river. That by appropriation made prior to that of plaintiffs or their grantors, defend-

ants are entitled to as much water as will flow through their head-gate, which is three feet wide, with a fall to the water of one-quarter of an inch to the rod in their ditch.

VII.

Defendants further answer and allege that when plaintiffs constructed their dam and ditch they appropriated only such a quantity of water to become applicable to their uses in what is known as the dry season of the year, as the just proportion of the whole quantity which their ditch could carry, bore to the average quantity of water annually flowing in said river, and that under their appropriation made by them as they allege in their complaint they are not entitled to any greater quantity of water in the dry season than one-tenth of the water flowing in the river during such season—the average quantity of water annually flowing in said river being about ten times the quantity flowing in said river in the dry season.

VIII.

Defendants for a further answer and defense allege that plaintiffs have constructed their ditch for a long distance below their head-gate as to induce, by the fall given to their ditch, a quantity of water to pass from the waters collected at their dam from the flow of the river into their ditch, three times greater than the quantity which would pass through without pressure, and that instead of the water passing into their head-gate without pressure, the pressure at said head-gate by the fall given to said ditch is accelerated and increased, so as to abstract the quantity of water flowing in the river aforesaid.

IX.

Defendants deny that any acts on their part have caused or are likely to cause any irrepara- *before the commencement of this action he has* ble or other injury to plaintiffs or either of them.

Wherefore defendants demand that plaintiffs' complaint be dismissed and that the order of injunction issued herein against defendants in relation to the use of the water of said river be vacated and set aside.

Defendants demand a separate verdict and that they have their costs and disbursements of this action.

HERRING & HERRING,
Attorneys for Defendants.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Peter B. Crane, being duly sworn, says that he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except the matters which are therein

stated on his information and belief, and as to those matters he believes it to be true.

PETER B. CRANE.

Sworn and subscribed before me this 21st day of June, A. D. 1888.

[SEAL.] GEO. H. DAILY,
Clerk District Court.

Filed June 21, 1888, at 2 o'clock p. m.

GEO. H. DAILY, *Clerk.*

23 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, S. B. CURTISS, and SAMUEL SUMMERS
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP KEE, a Chinaman, and The Boston Mining and Reduction Company, a Corporation.

Defendant Hop Kee, appearing herein by his attorneys, Herring & Herring, demurs to the complaint of plaintiff- on the ground that said complaint does not state facts sufficient to constitute a cause of action.

I.

Defendant for his answer to the complaint of plaintiff- alleges that for more than five years before the commencement of this action he has been in the peaceable and adverse possession of six hundred inches of the waters of the San Pedro river, flowing to the lands occupied and used by him for agricultural purposes, being in extent about one hundred and sixty acres, and that during said period of five years defendant has been using and enjoying the said water right, and that the same has constituted a material part of the value of his property and estate, upon which he has during said
24 period paid taxes, and that defendant has been so using, enjoying and claiming said water during said period under a deed duly registered. Defendant further alleges that during the said period of five years plaintiff- had actual knowledge that defendant was claiming, using and enjoying the said water as above described adversely to any right or property therein or appropriation thereof by plaintiffs or their predecessors or grantors, and defendant pleads the statute of limitations of this Territory, section 3, chapter one, title XLIV of the Revised Statutes as a bar to any recovery on the part of plaintiffs or either of them against defendant of the waters aforesaid or any right or interest therein, used and claimed by the defendant as aforesaid.

Defendant further shows that his peaceable and adverse possession, use and enjoyment of said water for said period of five years, has been continuous and uninterrupted.

II.

Defendant, for a further answer and defense to the complaint of plaintiff, alleges that he is in possession of the water and right to use the same, flowing in the San Pedro river, to the amount of six hundred inches, to the lands and premises occupied and used by defendant for purposes of irrigating and cultivating the lands occupied, owned and held by him, and claims said water and right to use the same by right of possession, and that he has had such possession and has claimed the right of possession for more than two years before the commencement of this action; that said right has been claimed, possessed and exercised for said period continuously and uninterruptedly, adversely to plaintiffs and with their knowledge, and defendant pleads the statute of limitations of this Territory, being section 5, chapter 1, title XLIV, of the Revised Statutes, as a bar to any recovery of the part of plaintiffs or either of them against the defendant, of the waters aforesaid, or any right or interest therein used, claimed and possessed by defendant as aforesaid.

III.

Defendant denies that plaintiffs and the Contention Consolidated Mining Company, or their grantors or predecessors in interest, have, at the time stated in plaintsffs' complaint, or at any other time, appropriated the quantity of water in the San Pedro river flowing to their dam sufficient to fill the head-gate of their ditch, as described in said complaint, and to run the quartz mill of said company; and defendant denies that any appropriation of the waters of the San Pedro were ever made by plaintiffs and their predecessors and grantors for the purpose or irrigating the lands of plaintiffs and for the purpose of running the quartz mill of said Contention Consolidated Mining Company, but defendant shows, on the contrary, that whatever quantity of water of said river was appropriated at any time by plaintiffs was appropriated solely for the purpose of irrigating the lands which plaintiffs owned at the time of their appropriation of said waters; and defendant denies that at the time plaintiffs constructed their dam and ditch they appropriated sufficient water to irrigate six hundred and forty acres of land, nor was the amount of water claimed to have been appropriated by plaintiffs necessary, nor is such amount of water now necessary for the purpose of irrigating six hundred and forty acres of land, and defendant denies that plaintiffs are now, or ever have been, in the possession of, or do now own or have at any time owned or controlled, six hundred and forty acres of arable lands along said San Pedro river which could be cultivated by irrigating the same from the waters conducted from said river by said ditch of plaintiffs, nor have plaintiffs six hundred and forty acres of land along said river under cultivation by means of irrigating the same from the waters conveyed from said river by means of their dam and ditch.

IV.

Defendant denies that plaintiffs are entitled to such an amount of water as will irrigate six hundred and forty acres of land, and defendant denies that plaintiffs are the owners of an undi-
27 vided half interest in the dam and ditch, and the water flowing through their said head-gate, described in the plaintiffs' complaint, nor is the Contention Consolidated Mining Company the owner of the other half interest therein and defendant shows in such respect he takes his objection by way of answer to plaintiffs' complaint, for the reason that the fact does not appear upon the face of the complaint, that plaintiffs have no privity or unity of interest in said dam or ditch or the waters diverted thereby, and are not jointly the owners of an undivided one-half interest therein or of any interest therein and are therefore improperly joined as parties plaintiff herein.

V.

Defendant denies that since the rights of plaintiffs have attached, and their appropriation of the water has been made, or that while plaintiffs were in the actual use of said water, dedefendants or any one under whom he claims, has constructed any ditches or dams above plaintiffs on the San Pedro river, and is thereby diminishing the natural flow of the water in the bed of said river.

VI.

Defendant for a further answer and defense to the complaint of plaintiffs alleges that he is the owner of about one hundred
28 and sixty acres of land upon the San Pedro river, in Cochise county, lying above the dam and ditch of plaintiffs, and that prior to any appropriation of plaintiffs or the Contention Consolidated Mining Company, or the grantors or predecessors in interest of either of them, of any of the waters of the San Pedro river, defendant and his grantors and predecessors in interest appropriated six hundred inches of water of said river for the purpose of irrigating the arable lands along said river, now owned and occupied by defendants, which said amount of water is required and necessarily used by defendant in irrigating his arable and irrigable lands along said river owned, held and occupied by him as aforesaid.

VII.

Defendant denies that plaintiffs ever appropriated from said river all the water thereof which their ditch can carry in the dry season of the year, nor are they entitled thereto at what is commonly known as the dry season of the year.

VIII.

Defendant for a further answer and defense alleges that plaintiffs have so constructed their ditch for a long distance below their head-gate as to induce, by the fall given to their ditch, a quantity of water to pass from the waters collected at their dam from the flow

of the river into their ditch, three times greater than the
29 quantity which would pass through their head-gate without pressure, and that instead of the water flowing through their head-gate without pressure, the flow at said head-gate by the fall given to said ditch is accelerated and increased, so as to abstract the water collected at the plaintiffs' dam by a pressure three times greater than such pressure as is claimed in plaintiffs' complaint in their right of appropriation.

IX.

Defendant denies that the Contention Consolidated Mining Company has required or used any water this year to run its quartz mill, nor was said company requiring or using any of the water flowing in the ditch aforesaid at the time this action was commenced.

X.

Defendant denies that any act on his part has caused or is likely to cause any irreparable or other injury to plaintiffs or either of them.

Wherefore defendant demands that plaintiffs' complaint be dismissed as to this defendant, and that the order of injunction issued herein against defendant in relation to the use of the water of said river be vacated and set aside.

30 Defendant demands a separate verdict and that he have his costs and disbursements of this action.

Dated June 29th, 1888.

HERRING & HERRING,
Attorneys for Defendants.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Hop Kee, being duly sworn, says that he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

HOP KEE.

[SEAL.] Sworn and subscribed before me this 29th day of June, 1888.

JOHN C. EASTON,
Notary Public.

Filed June 30, 1888, at 10 o'clock a. m.

GEO. H. DAILY, *Clerk.*

31 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP LEE, a Chinaman, and The Boston Mining and Reduction Company, a Corporation.

Defendant H. C. Herrick, appearing herein by his attorneys, Herring & Herring, demurs to the complaint of plaintiffs on the ground that said complaint does not state facts sufficient to constitute a cause of action.

I.

Defendant for his answer to the complaint of plaintiffs alleges that for more than five years before the commencement of this action he has been in the peaceable and adverse possession of six hundred inches of the waters of the San Pedro river, flowing to the lands occupied and used by him for agricultural purposes, being in extent about one hundred and sixty acres, and that during the said period of five years defendant has been using and enjoying the said water right, and that the same has constituted a material part of the value of his property and estate, upon which he has during said period paid taxes, and that defendant has been so using,
32 enjoying and claiming said water during said period under a deed duly entitled to be registered.

Defendant further alleges that during the said period of five years plaintiffs had actual knowledge that defendant was claiming, using and enjoying the said water as above described adversely to any right or property therein or appropriation thereof by plaintiffs or their predecessors or grantors, and defendant pleads the statute of limitations of this Territory, section 3, chapter one, title XLIV of the Revised Statutes as a bar to any recovery on the part of plaintiffs or either of them against defendant of the waters aforesaid or any right or interest therein, used and claimed by defendant as aforesaid.

Defendant further shows that his adverse use and enjoyment of said water for said period of five years, has been continuous and uninterrupted.

II.

Defendant, for a further answer and defense to the complaint of plaintiffs, alleges that he is in possession of the water and the right to use the same, flowing in the San Pedro river, to the amount of six hundred inches, to the lands and premises occupied and used by defendant for purposes of irrigating and cultivating the lands occupied by him, being about one hundred and sixty acres, and defendant claims said water and right to use the same by right
33 of possession, and that he has claimed said right of possession for more than two years before the commencement of this action; that said right has been claimed, possessed and exer-

cised for said period continually and uninterruptedly, adversely to plaintiffs and with their knowledge, and defendant pleads the statute of limitations of the Territory, being section 5, chapter 1, title XLIV, of the Revised Statutes, as a bar to any recovery on the part of plaintiffs or either of them against this defendant, of the waters aforesaid, or any right or interest therein used, claimed and possessed by defendant as aforesaid.

III.

Defendant denies that plaintiffs and the Contention Consolidated Mining Company, or their grantors or predecessors in interest, have, at the time stated in plaintiffs' complaint, or at any other time, appropriated the quantity of water in the San Pedro river flowing to their dam sufficient to fill the head-gate of their ditch, as described in said complaint, and to run the quartz mill of said company; and defendant denies that any appropriation of the waters of the San Pedro river were ever made by plaintiffs and their predecessors and grantors for the purpose of irrigating the lands of plaintiffs and for the purpose of running the quartz mill of said Contention
34 Consolidated Mining Company, but defendant shows, on the contrary, that whatever quantity of water of said river was appropriated at any time by plaintiffs was appropriated solely for the purpose of irrigating the lands which plaintiffs owned at the time of their appropriation of said waters; and defendant denies that at the time plaintiffs constructed their dam and ditch they appropriated sufficient water to irrigate six hundred and forty acres of land, nor was the amount of water claimed to have been appropriated by plaintiffs necessary, nor is such amount of water now necessary for the purpose of irrigating six hundred and forty acres of land, and defendant denies that plaintiffs are now or ever have been in the possession of, or do now or have at any time owned or controlled, six hundred and forty acres of arable lands along said San Pedro river which could be cultivated by irrigating the same from the waters conducted from said river by said Union ditch nor have plaintiffs six hundred and forty acres along said river under cultivation by means of irrigating the same from the waters conveyed from said river by means of their dam aud ditch.

IV.

Defendant denies that plaintiffs are entitled to such amount of water as will irrigate six hundred and forty acres of land, and defendant denies that plaintiffs are the owners of an undivided
35 half interest in the dam and ditch and the water flowing through their said head-gate, described in the plaintiffs' complaint, nor is the Contention Consolidated Mining Company the owner of the other half interest therein and defendant shows in such respect he takes his objection to plaintiffs' complaint by way of answer, for the reason that the fact does not appear upon the face of the complaint, that plaintiffs have no privity or unity of interest whatever in the said dam or ditch or the waters diverted thereby,

and are not jointly the owners of an undivided one-half interest therein or of any interest therein and are therefore improperly joined as parties plaintiff herein.

V.

Defendant denies that since the rights of plaintiffs have attached, and their appropriation of the water has been made, or that while plaintiffs were in the actual use of said water, that defendant or any one under whom he claims, has constructed any ditches or dams above plaintiffs on the San Pedro river, in Cochise county, and is thereby diminishing the natural flow of the water in the bed of said river.

VI.

Defendant for a further answer and defense to the complaint of plaintiffs alleges that he is the owner of about one hundred
36 and sixty acres of land upon the San Pedro river, in Cochise county, lying above the dam and ditch of plaintiffs, and that prior to the appropriation by plaintiffs or the Contention Consolidated Mining Company, or the grantors or predecessors in interest of either of them, of any of the waters of the San Pedro river, defendant and his grantor and predecessor in interest appropriated six hundred inches of water of said river for the purpose of irrigating the arable lands along said river, which said amount of water is required and necessarily used by defendant in irrigating his arable and irrigable lands along said river.

VII.

Defendant further answers and alleges that when plaintiffs constructed their dam and ditch they appropriated only such a quantity of water to become applicable to their uses in what is known as the dry season of the year as the just proportion of the whole quantity which their ditch could carry bore to the average quantity of water annually flowing in said river, and that under their appropriation made by them as they allege in their complaint they are not entitled to any greater quantity of water in the dry season than one-tenth of the water flowing in the river during such season; the average quantity of water annually flowing in said river being about ten times the quantity flowing in said river in the dry season.

37 VIII.

Defendant for a further answer and defense alleges that plaintiffs have so constructed their ditch for a long distance below their head-gate as to induce, by the fall given to their ditch, a quantity of water to pass from the waters collected at their dam from the flow of the river into their ditch, three times greater than the quantity which would pass through without pressure, and that instead of the water passing into their head-gate without pressure, the pressure at

said head-gate by the fall given to said ditch is accelerated and increased, so as to abstract the quantity of water flowing in the river as aforesaid.

IX.

Defendant, further answering, alleges that the following-named persons, to wit: Chas. Noyes, Al. Noyes and Augustus Noyes, Hop Kee and one John Doe Christensen, whose Christian name is not known to defendant, are all using the waters of said river by means of various dams and ditches constructed for the purpose of diverting the waters of said river upon their lands for the purpose of irrigating the same; that the amount of land upon which the water is thus used exceeds three hundred acres and all of said lands are situate above the dam and ditch of plaintiffs, and with the ex-
38 ception of Hop Kee all the water appropriated by the above-named parties has been appropriated subsequently to the appropriation made by defendant; that the persons above named are engaged in raising large crops upon their said lands and use a very large amount of the water upon their respective lands; that defendant is advised, informed and believes, and therefore alleges upon his information and belief, that there cannot be a complete determination of the equitable rights of the parties to this action without bringing the said Chas. Noyes, Al. Noyes and Augustus Noyes, Hop Kee and John Doe Christensen and making them parties defendant to this action and adjudicating upon the equitable rights and interests of all the parties in the waters of said river for purposes of irrigation or otherwise.

Wherefore defendant prays that an order may be made herein, that the process of this court, with a copy of the complaint of plaintiffs and the answer of this defendant, be served upon each of the aforesaid persons, and that an order be made by this court, and a copy thereof also at the same time be directed to be served upon each of said parties to show cause, at a day fixed, why they should not be made parties defendant to this action and bound by the judgment or decree of this court herein.

X.

Defendant denies that any act on his part has caused or is
39 likely to cause any irreparable or other injury to plaintiffs or either of them.

Wherefore defendant demands that plaintiffs' complaint be dismissed as to this defendant, and that the order of injunction issued herein against defendant in relation to the use of the water of said river be vacated and set aside.

Defendant demands a separate verdict and that he have his costs and disbursements of this action.

Dated June 21st, 1888.

HERRING & HERRING,
Attorneys for Defendants.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

H. C. Herrick, being duly sworn, says that I am one of the defendants in the above-entitled action, that I have heard read the foregoing answer and know the contents thereof, that the same is true of my own knowledge except the matters which are therein stated on my information and belief, and as to those matters I believe it to be true.

H. C. HERRICK.

Sworn and subscribed before me this 21st day of June,
[SEAL.] A. D. 1888.

GEO. H. DAILY, *Clerk.*

40 Filed June 21st, 1888, at 2 o'clock p. m.

GEO. H. DAILY,
Clerk District Court.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS, Pl't'ffs,
vs.
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP LEE, a Chinaman, and The Boston Mining and Reduction Company, Robert T. Swan, as Trustee, and Others, Def'ts.

Come now Chas. Noyes, Al. Noyes and H. M. Christiansen, three of the persons made defendants in the entitled action, by order of court, and for themselves, and not for any of the other defendants, demur to the complaint of plaintiffs and to the answer of Robert T. Swan, one of the defendants herein, upon the following grounds:

I.

That neither said complaint nor said answer state facts sufficient to constitute a cause of action against these defendants or either of them.

II.

That it does not appear from said complaint nor from said answer that these defendants or either of them have any interest in said action or the subject-matter thereof, and it does appear from
41 said complaint and answer that these defendants are improperly joined and made defendants in this action.

III.

That it appears from said complaint and answer that the court has no jurisdiction of the persons of these defendants or either of them.

Answering said complaint and said answer of the defendant, Robert T. Swan—

These defendants deny each and every allegation contained in said complaint and in said answer of the said Robert T. Swan. Further answering said complaint and said answer of defendant, Robert T. Swan, these defendants aver—

I.

That H. M. Christiansen, one of these defendants, is now and has been ever since the year 1877 the owner of and in the actual possession and occupation of a tract of land containing about one hundred and sixty acres through which the San Pedro river runs, and situated about two and one-half miles south of the town of Fairbanks, in the county of Cochise, Territory of Arizona. That said land is arable and irrigable, and with irrigation is capable of and will produce large and valuable agricultural crops, and with irrigation said land is of great value, but without irrigation said land is wholly valueless for agricultural or any purposes
42 whatever, that said land can be irrigated by the waters from said San Pedro river, which runs through the same, and from no other source whatever. That said defendant H. M. Christiansen has occupied and cultivated said land continuously ever since the year 1877, and has during all of said time irrigated the same with water from said river, and has annually during all of said time by means of said irrigation produced large and valuable crops upon said lands and premises.

II.

That Charles Noyes and Al. Noyes, two of these defendants, are now and have been ever since the year 1878 the owners of and in the actual and continuous possession of a certain tract, piece or parcel of land containing one hundred and sixty acres, situated upon the San Pedro river and next north of the said lands of said defendant, H. M. Christensen and next south of the lands of Hop Lee, one of the defendants in this action, in the county of Cochise and Territory of Arizona, said land so owned and occupied by the said defendants, Charles Noyes and Al. Noyes, as aforesaid, lies upon both sides of the said San Pedro river and extend- from the lands of the said Hop Lee south and up said river about one-half mile and to the lands of the said defendant, H. M. Christensen; that
43 the said lands of Charles and Al. Noyes are arable and irrigable; that with irrigation said lands are capable of and do produce annually large and valuable agricultural crops of great value, but without irrigation said lands are wholly incapable of producing any agricultural or other crop whatever; that with irrigation said lands are of great value, but without irrigation said lands are wholly valueless; that said lands are so situated that they can only be irrigated by the waters from the San Pedro river, which runs through the same as aforesaid.

III.

That these defendants, Charles Noyes and Al. Noyes, have at great cost and expense fenced, inclosed and improved their said lands,

and have resided upon, occupied and cultivated the same continuously ever since the year 1878, and have during all of said time irrigated the same with the waters from said river, taken therefrom by means of a ditch or canal, and have during all of said time by means of said cultivation and irrigation produced annually large and valuable agricultural crops thereon and are still so doing.

IV.

That in the year 1878 these defendants, H. M. Christiansen, Charles Noyes and Al. Noyes, for the purpose of irrigating their said respective tracts of land hereinbefore described, dug and
44 constructed a ditch from a point on said San Pedro river about one-half mile south of the lands of the said H. M. Christiansen and hereinbefore described, to and upon the said respective tracts of land of these defendants, which said ditch was constructed about six feet deep from the surface of the ground at the point where the same intersected the channel of said river, and about four feet wide at the bottom thereof at said point where it intersected said river channel, and these defendants then and there at the time aforesaid constructed a dam in said river channel below the mouth or head of said ditch, about four feet high and of sufficient hight to turn the water of said river into their said ditch to the depth of eighteen inches and four feet wide, the full width of their said ditch thereof as aforesaid, and then and there in the year aforesaid turned into their said ditch the waters of said river to the extent, width and depth aforesaid, and then and there and by the means aforesaid diverted and appropriated so much of the waters of said river as would flow through their said ditch to their own use for the purposes of irrigating their said respective tracts of land, and these defendants then and there in the year last aforesaid by means of said dam and ditch conducted said water to the full capacity of their said ditch to and upon their aforesaid respective tracts of land for the purpose of irrigating
45 and cultivating the same, and from thence hitherto these defendants have continuously diverted from said river and appropriated to their own use, and owned and used for the purposes aforesaid the whole quantity of water so diverted from said river and conducted and conveyed to and upon their said lands as aforesaid, and are now the owners of the same and of the use thereof for the purposes aforesaid.

That in the latter part of the year 1880 said dam so constructed in said river by these defendants as aforesaid, for the purposes aforesaid, was carried away by floods or high water in said river, and these defendants thereafter and in the month of January, 1881, in lieu of re-erecting said dam, so constructed by them for the purposes aforesaid, deepened their said ditch and at the head thereof to the extent of three feet, a little more or less, and constructed and placed in the mouth or head of their said ditch a box forty inches in width and twenty inches in the clear and of sufficient capacity to carry the amount of water theretofore diverted from said river

and appropriated by these defendants as aforesaid, and no other or greater quantity of said water, and placed a head-gate in said box, forty inches long and twenty inches wide or deep, and these defendants aver that from thence hitherto said original amount
46 of water so diverted and appropriated by them as aforesaid has continuously and uninterruptedly flowed through said box and their said ditch to and upon their said lands and now so does, and these defendants aver that they have ever since their said diversion and appropriation in the manner aforesaid, claimed, owned and used the same as their property and for their exclusive use and benefit, with the full knowledge of plaintiffs and of the defendant, Robert T. Swan, and of his and their grantors and predecessors, and these defendants aver that the whole of the said water so diverted and appropriated and used by them as aforesaid is necessary for the purpose of irrigating their said several tracts of land, and these defendants aver that they are now the owners of said water right and water so diverted and used by them as aforesaid, and of the use thereof for the purposes aforesaid, in the following proportions: That is to say the defendant, H. M. Christiansen, is the owner of the undivided one-half thereof, and defendants Charles Noyes and Al. Noyes are the owners of the other half thereof, and that these defendants have been so the owners and entitled to the use thereof continuously ever since the year 1878, and as such owners have during all of said time used and enjoyed the same in their own right for the purposes aforesaid and now so do.

47 For another and further defense to said complaint and to the answer of the defendant, Robert T. Swan, and to the alleged cause of action therein set forth against these defendants, these defendants aver:

I.

That they hereby refer to, adopt and make a part of this defense all of the allegations contained in the foregoing and second defense herein.

II.

These defendants aver that for more than five years next prior to the commencement of this action they, the defendants, have been and still are in the sole, peaceable, open, continuous, exclusive and notorious and adverse possession and enjoyment of the beneficial use of all of that portion and amount of the waters of the San Pedro river so appropriated and diverted and used by them in the manner and for the purposes set forth in the fourth paragraph of said second defense, to the full extent and capacity of their said ditch, as therein set forth; and these defendants aver that they have for more than five years next prior to the commencement of this action owned, peaceably possessed, paid the taxes thereon and openly and notoriously claimed said water right, waters and the exclusive use thereof for the purposes set forth in said second defense, in their own right, adversely to all the world. And these defend-
48 ants plead the statute of limitations as set forth in section 3, of chapter 1, title XLIV, of the Revised Statutes of the Ter-

ritory of Arizona, and also the statute of limitations of said Territory as set forth in section 5, of chapter 1, title XLIV, of said Revised Statutes.

And for another and further defense to the answer of the defendant, Robert T. Swan, these defendants deny:

I.

That said defendant, Robert T. Swan, or his grantors or predecessors, or either or any of them, own or ever owned 640 acres of arable or irrigable land upon the San Pedro river, as alleged in said answer, or that he or they ever cultivated or irrigated with the waters from said river six hundred and forty acres of land, or that he or they ever at any time prior to the year 1885 cultivated or irrigated, by the use of the waters from said river, any other or greater quantity of land than forty (40) acres; and these defendants deny that the said defendant, Robert T. Swan, or his grantors or predecessors ever, at any time prior to the year 1885, diverted or conducted from said river for the purposes of irrigation any other or greater quantity of water than was sufficient to irrigate said forty acres of land.

These defendants deny that said defendant now cultivates
49 and irrigates 640 acres of land, as alleged in his said answer, or that he or his grantors ever at any time or at all irrigated or cultivated more than two hundred acres of their tract of land described in his said answer, or that he or they ever at any time diverted any other or greater quantity of water from said river than was or is necessary to irrigate said two hundred acres, and these defendants deny that said defendant, Robert T. Swan, or his grantors or predecessors or either of them ever at any time or at all constructed the ditch or dam of the capacity alleged, or that he or they ever at any time or at all diverted from said river the quantity of water alleged by him, for agricultural or other useful or beneficial purposes or that he or they ever at any time or at all prior to the year 1885 diverted from said river or appropriated to his use or their use any other or greater quantity of water than one hundred miner's inches of water, and defendants aver that said water so diverted was chiefly used for milling purposes and not for irrigation. And these defendants deny that the said defendant, Swan, is entitled to the use of more than sufficient water from said river to irrigate any other or greater quantity of land than forty acres of said tract of land claimed by him or otherwise.

Wherefore these defendants pray that said complaint and
50 the said answer of the said Robert T. Swan be dismissed as to them and that they be adjudged and decreed to be and have been the owners of and entitled to the use and enjoyment of so much of the waters of the San Pedro river as will at any and all times flow through their said ditch and the head thereof as now constructed, to and upon their said lands for the purposes of the irrigation thereof, and that the several rights of these defendants

thereto be decreed by this court, and for such other and further relief as may be just and equitable in the premises, and for costs.

WM. M. LOVELL,
Attorney for Defendants Charles Noyes, Al. Noyes, and H. M. Christiansen.

TERRITORY OF ARIZONA, *County of Cochise,* } ss:

Charles Noyes, being duly sworn, says that he is one of the defendants in the foregoing-entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to the matters
51 therein stated upon information and belief, and that as to those matters he believes it to be true.

CHARLES NOYES.

Subscribed and sworn to before me this 23d day of November, 1888.

[SEAL.] GEO. H. DAILY, *Clerk.*

Filed Nov. 22d, 1888, at 11 o'clock a. m.

GEO. H. DAILY, *Clerk.*

In the District Court, First Judicial District of Arizona, in and for Cochise County.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.*

Plaintiffs amend their original complaint filed in this action, and for amendment make Robert T. Swan party defendant to this action and allege that defendant Swan resides, as plaintiffs are informed and believe, in the State of Massachusetts. They hereto attach a copy of their original complaint and adopt and make all the allegations therein contained the allegations of this amendment as fully and completely as if repeated herein *haec verbæ*. They pray for
52 the same relief and judgment against defendant Swan as is prayed for in original complaint against the defendants therein named.

GOODRICH & STREET,
Attorneys for Plaintiffs.

Filed June 23d, 1888.

GEO. H. DAILY, *Clerk.*

Service of copy or original complaint as within and summons on defendant Swan is hereby waived this 23d day of June, 1888.

W. H. STILWELL,
Attorney for Defendants.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS, Defendants,
against
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP KEE, a Chinaman, and THE BOSTON MINING AND REDUCTION COMPANY.

Now comes the above-named defendant, The Boston Mining and Reduction Company, and makes answer to the complaint of plaintiffs herein as follows:

53 Defendant shows and alleges that it has not, and for a long time prior to the commencement of this action, had no interest in any property, business or water rights whatever in the county of Cochise or Territory of Arizona, and that defendant is not now nor for a long time prior to the commencement of this action has it diverted, or been interested directly or indirectly in the diversion of any water or waters from the San Pedro river, in said county of Cochise, Territory of Arizona.

And for a further and separate defense to said action defendant denies each and every allegation set forth in said complaint.

Wherefore defendant asks that this action be dismissed as to this defendant, and for costs incurred herein.

W. H. STILWELL,
Defendant's Attorney.

Amended Answer.

Now comes the above-named defendant, The Boston Mining and Reduction Company, a corporation, and on leave of the court first had and obtained amends the foregoing answer as follows, to wit: By inserting after the word "action" in the nineteenth line of this answer, and also after the word "action" in the twenty-fifth line of this answer the following words:

54 "To wit: since the 26th day of March, A. D. 1888, when all the rights, title and interest of the said Boston Mining and Reduction Company in said county of Cochise were conveyed to Robert T. Swan, trustee."

Dated June 6th, 1889.

W. H. STILWELL,
Attorney for said Defendant.

Filed Aug. 31, 1888, at 3 o'clock p. m.

GEO. H. DAILY, *Clerk.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.*

The Grand Central Mining Company, a corporation, having been commanded to come in by the court, as a party to this action, to do

and receive such judgment upon its respective right as the court shall deem just and proper, hereby appears by its attorneys, Herring & Herring, and shows and alleges that:

I.

It is a corporation duly organized under the laws of the Territory of Arizona and is engaged in the business of mining and milling and reducing ores in said county of Cochise; that its mill is
55 erected in said county, a short distance below the village of Fairbanks and upon lands adjacent to the San Pedro river, from which it derives the necessary water for milling purposes by means of a dam and ditch owned and constructed by defendant, which water, after being used for such purposes, is returned to said river above the dam of plaintiffs; that said water was appropriated by this defendant and has been openly, notoriously and continuously used for such purpose by defendant, adversely to each and every party to this action for a period of more than five years before the commencement of this action; that the use and possession of said water has been peaceably held during said period by this defendant and the same has been used for beneficial purposes during said period.

Wherefore defendant pleads the statute of limitations of the Territory of Arizona as a bar to any recovery against defendant or any interference with its rights in and to the use of said waters of said river for the purposes aforesaid.

That the water of said river so used, held and appropriated is and has been, and will continue to be, necessary for the milling business of defendant, and defendant denies any and all prior appropriations of the water of said river by each and every party hereto, and denies that any use or possession of said water excludes the defendant from the right to have a sufficient
56 quantity of water flowing in said river at all times to enable defendant to conduct its milling business.

Wherefore defendant prays judgment against each and every party to this action and that its right to the sufficient and necessary flow of water in said river at its dam and ditch at all times for milling purposes be decreed, and that all the parties hereto be forever restrained and enjoined from interfering therewith, and that defendant have its costs.

HERRING & HERRING,
Attorneys for Defendant.

Filed Apr. 20, 1889, at 10 o'clock a. m.

GEO. H. DAILY, *Clerk.*

In District Court, First Judicial District of Arizona, in and for Cochise County.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.* } No. 1308.

Now come the plaintiffs and by leave of the court first had amend their original complaint on file in the above action and for amendment says, that it appears from the answers of some of the original defendants that the following-named persons are proper parties to this action and have been ordered to be made parties defend-
57 ant by this court, to enable the court to make a complete determination of all of the matters in controversy in this suit, and pray that they be made parties defendants herein, to wit: Charles Noyes, Al. Noyes, H. M. Christiansen, C. B. Kelton, C. M. Bruce, J. C. Hoges, W. C. Land, Robert Perrin, E. B. Perrin, G. F. Thornton, Hugh Tevis, the Grand Central Mining Company, a corporation, Augustus Noyes, William F. Banning, Levi Scranton, Peter Morse, W. C. Green, Joseph Hoefler, John W. Roberts.

That all of said parties reside in Cochise county, Arizona, except Robert and E. B. Perrin and G. F. Thornton, who reside in California, as plaintiffs are informed, and to save repetition plaintiffs hereby make the same allegations contained in their original complaint the allegations of this amendment as against said parties, and prays for same judgment against them as is prayed for in said original.

GOODRICH & STREET,
Attorneys for Plaintiffs.

Filed Mar. 1st, 1889, at 4 o'clock p. m.
GEO. H. DAILY, *Clerk*,
By J. B. HENNESSY, *Deputy*.

58 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL, A. B. WILD, and SAMUEL SUMMERS, Plaintiffs,
against
H. C. HERRICK, PETER CRANE, CARTER CRANE, HOP KEE, and Boston Mining and Reduction Company and Robert T. Swan, as Trustee, Def'ts.

Now comes the above-named defendant, Robert T. Swan, as trustee, and for himself alone answers plaintiffs' complaint herein as follows:

Defendant demurs to plaintiffs' complaint on the ground that said complaint does not state facts constituting cause of action.

Defendant denies each and every allegation set forth in plaintiffs' complaint.

And for a further and separate defense defendant shows:

I.

That defendant is the owner and in possession of those certain premises situated along the San Pedro river, Cochise county, Arizona Territory, commencing at a point designated by a large willow tree in said river, about one-half mile down the course of said river from the town of Charleston, said county, and extending thence northerly down and on both sides of said river a distance of nearly three miles, which premises embrace 640 acres of land and known as the Boston mill and ranch premises.

II.

That defendant, his grantors and predecessors in interest, settled upon the said premises and in the year 1878 located and appropriated the waters of the said San Pedro river to the full extent and capacity of a head-gate and ditch six feet wide and thirty inches deep for agricultural, mining and milling purposes on and in connection with said premises.

III.

That said appropriation of water aforesaid was made at a point designated by said willow tree in said San Pedro river, about one-half mile below said town of Charleston.

IV.

That defendant's grantors and predecessors in interest at once and immediately following said date of location and appropriation of said water of said river, at great cost and expense built and constructed at said willow tree in said river, a substantial and permanent dam, in and across said river, and laid out and constructed a large ditch conducting and diverting the waters of said river at said point to the full extent and capacity of the head-gate then placed in said ditch at said willow tree, which head-gate was six feet wide and thirty inches deep, and admitted a full flow of water through said head-gate with a fall of, through said gate and ditch, of three (3) feet per mile.

V.

That said ditch so built as aforesaid was and is now nearly three miles in length, and then and now extends the entire length of defendant's said premises, with smaller ditches therefrom extending over and across said premises for the purposes of irrigation and supplying water to defendant's steam quartz mill on said premises.

VI.

That ever since said date of appropriation and construction of said dam and ditch as aforesaid said quantities of waters have been by defendants, his grantors and predecessors in interest diverted from said river to the full capacity of said head-gate and necessarily used in cultivating and irrigating said premises and operating said

steam quartz mill, and defendant is now constantly necessarily using all of said quantity of water so appropriated and diverted upon said premises in irrigating said premises and growing agricultural crops thereon. And all of said water ever has been and is now constantly absolutely necessary in the proper cultivation of said premises.

And for a further separate and distinct defense defendant alleges and shows:

61 I.

That for more than five years last passed prior to the commencement of this action defendant, his grantors and predecessors in interest, have had and still have the sole, open, notorious, full, constant, uninterrupted, peaceable, exclusive and adverse beneficial use and enjoyment of the waters of the said San Pedro river, diverted and appropriated from the point and dam set forth in paragraph four of defendants' second defense, to the full extent and capacity of a head-gate six feet wide and thirty inches deep, with a fall of three feet per mile, and defendant pleads the statute of limitations of five years, as set forth in section 3 of chapter 1, title XLIV, Revised Statutes of Arizona; also the statute of limitations for two years, as set forth in section five of chapter one, title XLIV, Stat. of Arizona.

And for a further and separate defense and objection to plaintiffs' complaint for non-joinder of proper parties defendant, defendant shows:

I.

That the Babacomari creek in said county of Cochise naturally flows and empties into the said San Pedro river at a point above the alleged dam and ditch of plaintiffs and below the premises, dam and ditch of defendants; that the said Babacomari creek is naturally a large source of supply of water to the said San Pedro
62 river at and below the point where said creek empties into said river.

II.

That certain parties by names of C. M. Bruce, J. C. Hayes, W. C. Land, Robert Perrin, E. B. Perrin, G. F. Thornton and Hugh Tevis, doing business under the firm name and style of Tevis, Perrin, Land & Co., have recently and before the commencement of this action caused to be constructed a large ditch leading from said Babacomari creek, in said Cochise county, by means of which ditch large quantities of water are each year diverted from said creek, to the great reduction of the natural flow of water in said San Pedro river at and above the alleged ditch and dam of plaintiffs, during all seasons of the year and particularly during the dry season of each year.

That said diversion of water by said Tevis, Perrin, Land & Co., was, as defendant is informed and believes, made several years subsequent to defendant's appropriation of waters from the San Pedro river.

III.

The Grand Central Mining Company, a corporation, has recently and before the commencement of this action, and several years subsequent to defendant's appropriation of water, constructed a large dam in the said San Pedro river, in Cochise county and above
63 the alleged dam and ditch of plaintiffs and below the dam, ditch and premises of defendant, and by means of a large ditch constructed from said dam by said Grand Central Mining Company large quantities of water have been and are still being diverted by said corporation from said San Pedro river, which diversion of water greatly and materially diminishes the natural flow of water in said river below said dam and ditch so constructed by said Grand Central Mining Company.

IV.

That at another point on said San Pedro river above the alleged dam and ditch of plaintiffs and below the premises, dam and ditch of defendant, certain parties by the name of Augustus Noyes, Charles Noyes, Al. Noyes and H. M. Christiansen have recently and before the commencement of this action constructed a large dam in and across said San Pedro river and have diverted, and are still diverting, large quantities of water from said river, which diversion of water greatly and materially diminishes the natural flow of water below said dam so constructed by said Augustus Noyes, Charles Noyes, Al. Noyes and H. M. Christiansen.

V.

That farther up said San Pedro river and above the town of Charleston, in said county of Cochise, certain parties by the
64 names of William F. Banning and Levi Scranton, have recently and before the commencement of this action constructed a large dam in and across said San Pedro river, and by means of said dam and a large ditch have diverted and are still diverting large quantities of water from said San Pedro river upon the mesa and country adjacent thereto, which diversion of water greatly reduces and diminishes the natural flow of water in said river during all seasons of the year and particularly during the dry season of each year.

VI.

That still farther up said San Pedro river and in the county of Cochise, certain parties by names of Peter Moore and W. C. Green, have recently and before the commencement of this action constructed a large dam in and across said San Pedro river, and by means of said dam and a large ditch leading therefrom have diverted and are still diverting constantly large quantities of water from said San Pedro river, which diversion of water greatly and materially reduces and diminishes the natural flow of water in said river during all seasons of the year and particularly during the dry seasons of each year.

VII.

That immediately above the said dam and ditch constructed as aforesaid by said Moore and Green, and on the western bank of said
65 San Pedro river, and in the county of Cochise, are two or more large springs of water, which springs of water discharge constantly large volumes of water and the same naturally flows but a short distance, less than one-half mile, when said water is discharged without interruption into said San Pedro river, forming a large source of supply of natural waters in said river. That recently and before the commencement of this action Joseph Hoefler constructed a large dam and levee between said springs and the said San Pedro river and diverted the said waters from their natural channel and prevented said waters from reaching said river and has thereby cut off and destroyed a large natural supply of water, and greatly reduced and materially diminished the natural flow of water in said San Pedro river at all seasons of each year and particularly during the dry seasons of each year.

VIII.

That above and near the town of Hereford, on said San Pedro river, in the county of Cochise, John W. Roberts and C. B. Kelton have recently and before the commencement of this action constructed a large dam in and across the said San Pedro river and built a large ditch from said river at said dam, and by means of said dam and ditch have diverted and taken from said river
66 before the commencement of this action and are still diverting and taking from said river a large and constantly flowing stream of water, which diversion of water as aforesaid greatly and materially diminishes and reduces the natural flow and quantity of water in said river at all seasons of each year and particularly during the dry season of each year.

Defendant therefore asks that plaintiffs be required by order of this court to make C. M. Bruce, J. C. Hayes, W. C. Land, Robert Perrin, E. B. Perrin, G. F. Thornton, Hugh Tevis, the Grand Central Mining Company, a corporation, Augustus Noyes, Charles Noyes, Al. Noyes, H. M. Christiansen, Wm. F. Banning, Levi Scranton, Peter Moore, W. C. Green, Joseph Hoefler, John W. Roberts and C. B. Kelton parties to this action; that the said acts of said parties in diverting waters from and diminishing the natural flow and quantity of water in said San Pedro river, as aforesaid, may be enjoined, limited or determined as to this court shall appear proper and equitable.

Wherefore defendant asks that this action against defendant be dismissed with costs.

W. H. STILWELL,
Attorney for Defendant.
G. G. BERRY, *Of Counsel.*

67 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

N. W. Storer, being duly sworn, says that he is the agent of the above-named defendant, Robert T. Swan, and has charge and management in said county and Territory and is well acquainted with the same; that affiant has heard read the foregoing answer and knows the contents thereof; that the same is true except the matters therein stated on information and belief and as to those affiant believes them to be true.

N. W. STORER.

[SEAL.] Sworn and subscribed to before me this 31st day of August, A. D. 1888.

A. E. JACOBS,
Notary Public, Cochise County, A. T.

Filed Aug. 31, 1888, at 2 o'clock p. m.
GEO. H. DAILY, *Clerk.*

STATE OF CONNECTICUT,
OFFICE OF SECRETARY OF STATE.

The Boston and Arizona Smelting and Reduction Company.

We, W. A. Simmons, president, and W. A. Simmons, M. S. Pollard, H. W. Huguley and N. C. Parker, a majority of the directors of the Boston and Arizona Smelting and Reduction Com-
68 pany, a corporation organized under the laws of the State of Connecticut, in compliance with the requirements of said laws, do hereby certify under oath as follows:

1st. The purposes for which said corporation is formed are to smelt, reduce and work ores, metals and minerals in the Territory of Arizona or elsewhere, to erect buildings, works and machinery for said business and to mine for such metals, ores and minerals and to buy, sell, own and deal in any real or personal property necessary or convenient for said business and for its proper management.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, W. F. Bradley, county recorder in and for said county, do hereby certify that the above is a true and correct extract from the articles of incorporation of the Boston and Arizona Smelting and Reduction Company, now on file in said recorder's office of Cochise county, Arizona Territory.

[SEAL.] Given under my hand and seal of office this 14th day of May, A. D. 1889.

W. F. BRADLEY,
County Recorder.

Filed May 15, 1889, at 11 o'clock a. m.
GEO. H. DAILY, *Clerk.*

69 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.* } No. 1308. May Term, 1889.

On this, the — day of June, 1889, this cause came on regularly for trial, all the parties plaintiff and defendant appeared by their respective attorneys — announced ready for trial.

A jury was waived and by consent of all parties the cause was tried by the court without a jury, the same to be decided in vacation and by consent entered of record as of this term, and the court having heard all the evidence in the cause and the arguments of the respective attorneys for the several parties and being duly advised in the premises, finds the facts to be as follows:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.*

In this case I find that Hop Kee and Herrick are the owners of the first ditch, that about 1878 their predecessors appropriated as much water as would run through a ditch 18 inches wide on top, 12 inches on the bottom and 18 inches deep, each owning one-
70 half of the same, and each having the right to use the same.

I find that the next appropriation was by what is called the Mason and Cable ditch, now owned by the plaintiffs, who appropriated in 1878 so much water as would run through a gate 4.8 feet wide and one foot deep. I find that the next appropriation is by the ditch now owned by Noyes and Christiansen, who, in March, 1879, appropriated so much water as would run through a ditch three and a half feet wide. The evidence shows that this ditch has not been materially altered since, and they are entitled to the amount which it now carries. All of the above water was appropriated for agricultural purposes in irrigation. The fourth ditch is the Grand Central ditch, which appropriated water for milling purposes, and the water is—at least 85 per cent.—restored to the river, and the said company is entitled to continue the use of it; and that the ditch has not been materially increased since the appropriation. I find that the next ditch is what is called the Crane Bros. ditch, who, in 1884, appropriated the amount of water which their ditch now carries and which has not been materially increased since 1884. In 1885 Herrick increased his appropriation up to what is now used by him.

I find from the evidence in this case that the ditches on the upper San Pedro river do not appear to have materially interfered
71 with the uses of the water below, and hence this bill, as to them, is dismissed without costs, with the privilege that if it

shall appear hereafter that their use of the water interferes with the uses of the parties, as found by this decision, that they may file a bill for relief hereafter.

I find also that the uses of the water coming from the Babacomari creek are not shown by the evidence to interfere with the uses of the water below, and hence the bill, as to those parties using such water, is dismissed without costs, with the same privilege in case such use should hereafter be shown to interfere with the rights of the parties settled by this decision.

I find from the evidence that the Boston Mining and Milling Co. have appropriated water for milling purposes. I find that the articles of incorporation, which are to be treated as the charter of the corporation, show that the corporation was organized for mining, milling and reduction of ores and not for the purposes of irrigation, and I find that it was *ultra vires* to the purposes of that corporation to appropriate water for irrigation. A decree may be prepared in accordance with the above opinion.

I have not seen fit to give my reasons at large, through lack of time to so do.

Costs should be apportioned as follows: All costs equally divided between Herrick, Boston Company, or Swan, its successor,
72 and plaintiff-, except that of Hop Kee, Noyes Bros., Crane Bros., and Christiansen to pay their own costs.

Oct. 21, 1889.

WM. H. BARNES, *Judge.*

Wherefore it is by the court ordered, adjudged and decreed that the rights of the defendants, Hop Kee and H. C. Herrick in and to so much water of the San Pedro river as will flow through a ditch eighteen inches wide on the top, twelve inches wide on the bottom and eighteen inches deep, each owning one-half of the same, and each having the right to use the same, be and is hereby established, and that all of the plaintiffs in this action, to wit: John Hill, A. B. Wild, Samuel Summers and S. B. Curtis, and all of the defendants herein, except those herinafter mentioned as being dismissed from this cause, be, and are hereby, enjoined from diverting the waters of said San Pedro river until Hop Kee and said Herrick have first had the quantity allowed them herein, to wit: so much as will flow through a ditch eighteen inches wide on the top, twelve inches wide on the bottom and eighteen inches deep.

It is further ordered, adjudged and decreed that the right and title of said plaintiffs to so much of the waters of said San Pedro river as will flow through a gateway four and eight-tenths
73 feet wide and *and* one foot in depth, be and the same is hereby established and that all of the defendants herein to wit: Hop Kee, H. C. Herrick, Peter Crane, Carter Crane, The Boston Mining and Reduction Company, a corporation, Robert Swan, trustee, their agents, attorneys, servants, employés and all persons claiming under them or either of them, be and are hereby forever enjoined and restrained from diverting any of the waters of said San Pedro river, or from in any manner interfering with or ob-

structing the natural flow of the waters of said river until plaintiffs shall have first had and enjoyed the quantity of water herein allowed them, to wit: So much as will flow through a gateway four and eight-tenths feet wide by one foot in depth, provided, however, the defendants, Hop Kee and H. C. Herrick, are not to be interfered with in the enjoyment of their prior appropriation hereinbefore decreed to them.

It is further ordered, adjudged and decreed that the right and title of defendants Augustus Noyes, Al. Noyes, Charles Noyes and H. M. Christiansen in and to so much of the waters of said San Pedro river as will flow through a ditch thirty-seven inches wide by seventeen inches in depth, be and the same are hereby established, and that all of the plaintiffs and defendants herein except those who
are dismissed from this action, and that their agents, attor-
74 neys, servants, employés and others claiming under them or
either of them, be and hereby are forever enjoined from diverting any of the waters of the San Pedro river or from in any manner interfering with or obstructing the natural flow of the waters of said river after they have received the quantities as herein set forth and decreed to them respectively until said defendants Augustus Noyes, Al. Noyes and H. M. Christiansen shall have first had and enjoyed the quantity of water herein decreed to them, provided, however, that this is not in any way to interfere with the prior appropriation and rights of defendants Hop Kee and Herrick and plaintiffs as hereinbefore set forth and established.

It is further ordered, adjudged and decreed that the right and title of the Grand Central Mining Company in and to the waters of said San Pedro river, as claimed by it in its pleadings for milling and mining purposes, be and the same is hereby established, and that said company be and hereby is decreed to have the right to continue to use the quantity of water heretofore used by it for milling and mining purposes in the same manner and to the same extent and for the same purposes for which the same is now used and was used at the commencement of this action.

It is further ordered, adjudged and decreed that the right
75 and title of defendants Peter Crane and Carter Crane in and
to so much of the waters of said San Pedro river as was used by them at the commencement of this action be and the same is hereby established, and that all of the defendants and plaintiffs and their agents, servants, employés and claimants under them, except those dismissed by this decree from this cause, be and the same are hereby forever enjoined from diverting the waters of said San Pedro river or from in any manner interfering with or obstructing the waters of said river in their natural flow after they have received respectively the quantities of water herein decreed to them until said defendants Peter and Carter Crane have first had the quantity allowed them in this decree, provided, however, this is not in any way to interfere with the prior rights decreed to said plaintiffs and said defendants Hop Kee and Herrick as above set forth.

It is further ordered, adjudged and decreed that the Boston Mining and Reduction Company, a corporation, and those claiming

under said corporation or said trustee are entitled to none of the waters flowing in said river as against any of the parties to this cause, plaintiffs or defendants, for purposes of irrigation until the other rights herein established and decreed are first satisfied.

76 It is further ordered, adjudged and decreed that the following defendants be and are hereby dismissed from this cause and that they each recover their costs of defendant Swan, to wit: C. M. Bruce, J. C. Hayes. W. C. Land, Robert Perrin, E. B. Perrin, G. F. Thornton, Hugh Tevis, the copartnership styled Tevis, Perrin, Land and Company, W. F. Banning, Levi Scranton, Peter Moore, Joseph Hoefler, W. C. Green, E. J. Roberts, C. B. Kelton and all parties to this suit claiming under them, or either of them; but without prejudice to any of the parties to this action or to the rights of any of said parties to bring another suit, should the same become necessary or proper hereafter to the vindication of any of their rights.

It is further ordered, adjudged and decreed that the costs of this suit, other than those adjudged against defendant Swan in favor of the defendants dismissed from this cause, be paid as follows: By the plaintiffs four-sevenths and defendant Herrick two-sevenths and Swan, or Boston Mining and Reduction Company, one-seventh, except that the defendants, Hop Kee, Augustus Noyes, Al. Noyes, Charles Noyes and H. M. Christiansen each pay their own costs here taxed at the sum of — dollars, for which let execution issue.

77 It is further ordered, adjudged and decreed that in all cases and at all times when the waters of said San Pedro river naturally flowing thereon are sufficient in quantity to furnish and run an amount of water in the respective ditches as ordered, adjudged and decreed and as herein set forth in this decree that H. C. Herrick, defendant, is entitled to have, use and enjoy as much water of the San Pedro river for the purpose of irrigating his lands subject to the rights of the parties as herein decreed, to the extent of his increased appropriation in 1885, the said amount being the same as used by him for such purposes at the commencement of this action, and that all the plaintiffs and all the defendants, said Herrick, and those defendants dismissed excepted, are hereby enjoined from interfering with his right to the use and enjoyment of the same after the several quantities decreed to each have been taken.

October 21, 1889.

WILLIAM H. BARNES, *Judge, etc.*

Decree filed October 26, 1889.

GEO. H. DAILY, *Clerk.*

In District Court, First Judicial District of Arizona in and for Cochise County.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.* } No. —.

78 On this October 21st, 1889, the motion of defendants for new trial in above numbered and entitled cause came on for hearing. All parties appearing by their respective attorneys and the court having heard the arguments of the respective counsel for the several parties, and being duly advised in the premises overrules said motion, to which ruling of the court the several defendants by their counsel except and in open court give notice of appeal to the supreme court of Arizona Territory.

WM. H. BARNES, *Judge.*

Filed Oct. 26, 1889, at 4 o'clock p. m.
GEO. H. DAILY, *Clerk.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL *et al.*
vs.
H. C. HERRICK *et al.* }

Please take notice that Robert T. Swan, one of the defendants in the above-entitled action, hereby appeals to the supreme court of the Territory of Arizona from the judgment and decree therein made and entered against him in the said district court on the — day of Oct. 1889, in favor of said plaintiffs and against said
79 defendant in the said action and from the whole thereof.

Tombstone, Nov. 9th, 1889.

GEO. G. BERRY,
Attorney for said Defendant.

To the clerk of said district court and Goodrich & Smith, attorneys for said plaintiffs.

Filed Nov. 9, 1889, at 2 o'clock p. m.
GEO. H. DAILY, *Clerk.*

Service of the within notice of appeal hereby acknowledged this 9th day of Nov., 1889, without prejudice as to time of filing.

GOODRICH & SMITH.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

JOHN HILL *et al.*, Plaintiffs,
vs.
H. C. HERRICK *et al.*, Defendants. } Undertaking for Costs and Damages on Appeal.

Whereas, Robert T. Swan, trustee, one of the defendants in the above-entitled action, is about to appeal to the supreme court of the Territory of Arizona from a judgment and decree rendered against him. in said action, in the said district court, and in favor of the plaintiff, to the effect that he, the said defendant, represents a corporation which, under its charter, cannot take the waters of the
80 San Pedro river for the irrigation and cultivation of its lands, and for costs of suit, taxed at $——, and entered on the 21st day of October, A. D. 1889:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned residents of the county of Cochise and Territory of Arizona, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals this 16th day of November, 1889.

GEO. G. BERRY. [SEAL.]
GEO. H. FITTS. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Geo. G. Berry and Geo. H. Fitts, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: That he is a resident and householder in said county of Cochise, and that they are each worth double the amount specified therein over and above all their just debts
81 and liabilities, exclusive of property exempt from execution.

GEO. G. BERRY.
GEO. H. FITTS.

[SEAL.] Subscribed and sworn to before me this 16th day of November, A. D. 1889.

WM. C. STAEHLE,
Notary Public.

Approved and filed Nov. 16, 1889, at 1 o'clock p. m.
GEO. H. DAILY, *Clerk.*

Assignment of Errors.

I.

The court erred in holding that the defendant, Robert T. Swan, the successor in interest of the Boston and Arizona Smelting and

Reduction Company, could not use and hold title to water for the irrigation of the lands held by him as trustee for the stockholders of said company because such holding would be *ultra vires*, or for any other reason.

II.

The court erred in holding that a suit or action between
82 private persons concerning the right to the use of water for irrigation purposes, the question as to whether the corporation had exceeded its chartered powers could be raised and passed upon by the court, as the Territory alone could raise that question in a direct proceeding taken for that purpose.

GEO. G. BERRY,
Attorney for R. T. Swan.

Certificate of Clerk.

TERRITORY OF ARIZONA, *County of Cochise,* } 88 :

I, Geo. H. Daily, clerk of the district court of the first judicial district, Territory of Arizona, in and for the county of Cochise, said court being a court of record, having common-law jurisdiction and a clerk and a seal, do hereby certify that the foregoing is a full, true and correct copy of the original complaint, affidavit of N. W. Storer and order of injunction, amended complaint, answer of Crane Bros., answer of Hop Kee, answer of Herrick, answer of Chas. Noyes *et al.*, amendment to complaint, answer of Boston and Arizona Smelting and Reduction Company, answer of the Grand
83 Central Mining and Milling Company, amendment making new defendants, answer of Robert T. Swan, extract of articles of incorporation of Boston and Arizona Smelting and Reduction Company, judgment and decree, motion for new trial, notice of appeal by Robert T. Swan, bond on appeal and assignment of errors, as the same appears of record in this office.

District Court Seal. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Tombstone, this 20th day of December, A. D. 1889.

GEO. H. DAILY, *Clerk.*

(Endorsed:) No. 294. In the supreme court of the Territory of Arizona. John Hill *et al.*, plaintiffs & appellees, *vs.* H. C. Herrick *et al.*, defendants & appellants. Transcript on appeal. Separate appeal of the Boston Mining and Reduction Co. Filed Jan. 13th, 1890. J. E. Walker, clerk.

84 In the Supreme Court of the Territory of Arizona, Regular Term.

JOHN HILL, A. B. WILD, *et al.*, Plaintiff- & Appellee-,
vs.
H. C. HERRICK, PETER CRANE, *et al.*, Defendant- & Appellant-.

PHŒNIX, A. T., *January 14th*, 1890.

Ordered that this cause be continued to the adjourned term of this court to be held at Tucson.

Title of Court and Cause.

Motion to Dismiss Appeal.

And now comed plaintiffs and appellees and move the court to dismiss the appeal for that:

I.

There is no bond on appeal filed as provided by law, and especially that no bond is filed in compliance with paragraph 859 of Revised Statutes of Arizona nor in compliance with paragraph 863, Revised Statutes of Arizona, and that no appeal has ever been perfected.

85 II.

There is no statement of facts in the transcript nor filed on the appeal as provided by law, and especially none as contemplated and required by paragraphs 843, 844, and 937 of Revised Statutes of Arizona.

III.

There is no bill of exceptions in the transcript nor filed on the appeal as provided by law, and especially none such as is provided for in chapter seventeen of title XV, Revised Statutes of Arizona, nor in paragraph 937, Revised Statutes of Arizona.

IV.

No motion for a new trial containing any specification was made or filed as required by law, and the overruling of any motion for a new trial is not embodied in a bill of exceptions as required by law, and all things required by paragraphs 834 and 842, R. S., are omitted.

V.

There is not sufficient substance contained in the record to enable the court to decide the cause upon its merits.

GOODRICH & STREET,
Attorneys for Appellee.

(Endorsed:) Filed April 8th, 1890. J. E. Walker, clerk.

86 Adjourned Term.

Title of Court and Cause.

TUCSON, A. T., FRIDAY, *April 18th*, 1890.

The motion to dismiss appeal came on regularly to be heard by the court, Geo. G. Berry, Esq., appearing for appellant- and Goodrich & Street appearing for the appellees. Said motion was argued to the court by counsel and submitted.

Title of Court and Cause.

Order Dismissing Appeal.

The motion to dismiss the appeal in this case having heretofore, on the 18th day of April, 1890, been submitted and taken under advisement by this court, and having been fully considered by the court, and the court being fully advised in the premises, it is ordered that the appeal in this cause be dismissed, and the same is hereby dismissed. It is further ordered and adjudged that the appellee- recover of the appellants their costs herein.

Opinion rendered by the Hon. Joseph H. Kibbey, associate justice, Hon. Henry C. Gooding, chief justice, and Hon. Richard E. Sloan, associate justice, concurring.

87 Title of Court and Cause.

Opinion.

Per curiam:

Upon motion, for the reasons stated in Crowley *vs.* Reilley and upon the authority of that case, this appeal is dismissed, and there will be judgment accordingly.

H. C. GOODING,
Chief Justice.
JOSEPH H. KIBBEY, *A. J.*
RICHARD E. SLOAN, *A. J.*

(Endorsed:) Filed Jan. 24th, 1890. J. E. Walker, clerk.

Jan. Term, 1891.

Title of Court and Cause.

Notice of Appeal and Order Granting Same.

TUESDAY, *Feb. 3rd*, 1891.

In this cause Robert T. Swan, trustee, one of the appellants, through his counsel, Geo. G. Berry and Allen R. English, gave notice of appeal from the judgment of this court to United States Supreme Court, and said appeal was allowed by the court in open court this day, said notice having been given in open court this day, and the costs bond on appeal is fixed at $250.00, and Associate Justice Sloan is authorized to approve such bond.

88 Title of Court and Cause.

Affidavit.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

N. W. Storer, being by me first duly sworn, upon his oath deposes and says: I am the agent of the above-named Robert T. Swan, trustee, who is one of the defendants and the appellant in the above-entitled cause; that said Swan is in the State of Massachusetts, and as his agent I am authorized by him to sign his name and execute in his behalf the appeal or costs bond on appeal in this action to the U. S. Supreme Court, and as such agent I make this affidavit in his behalf because of his absence from this Territory and because I am acquainted with the facts; that the value of the property and the amount in controversy in this suit, which said U. S. Supreme Court is called upon to decide whether it belongs to said appellant or not, exceeds the sum of five thousand ($5,000.00) dollars. Further affiant saith not.

N. W. STORER.

Subscribed and sworn to before me thie March 4th, A. D. 1891.

A. H. EMANUEL,

[SEAL.] *Clerk District Court, Cochise Co., Arizona.*

(Endorsed:) Filed March 7th, 1891. J. E. Walker, clerk.

89 Title of Court and Cause.

Bond.

Know all men by these presents that we, Robert T. Swan, trustee, as principal, by his duly authorized agent, N. W. Storer, of Tombstone, Cochise county, Arizona Territory, and Geo. H. Fitts and W. K. Meade, both of the same place, as sureties, the first by occupation a merchant and the last by occupation a miner, are held and firmly bound to pay to the plaintiffs in the above-entitled action the sum of two hundred and fifty dollars, lawful money; for the payment of which sum, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 4th day of March, A. D. 1891.

Whereas on the hearing of the said action in the above-named supreme court the judgment and decision of the district court of the first judicial district of said territory was by said supreme court affirmed;

And whereas the above-named principal, Robert T. Swan, trustee, considering himself aggrieved thereby, did thereupon, in open supreme court of said Territory, give his notice of appeal
90 from the judgment and decision made and entered in said supreme court against him to the Supreme Court of the

United States, which appeal was thereupon allowed by said territorial supreme court, and the costs bond upon such appeal was thereupon by said territorial supreme court fixed at the sum of two hundred and fifty dollars: Now, therefore, the condition of the above obligation is such that — the said appellant, Robert T. Swan, trustee, shall duly prosecute his said appeal to effect, and if he fails to make his plea good shall answer all damages and costs as may be adjudged against him both in the Supreme Court of the United States and also in the said territorial supreme court, then the above obligation to be void; otherwise to remain in full force and effect.

ROBERT T. SWAN, *Trustee*, [SEAL.]

By his duly authorized agent,

N. W. STORER. [SEAL.]
GEO. G. FITTS. [SEAL.]
W. K. MEADE. [SEAL.]

91 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Geo. H. Fitts and W. K. Meade, the sureties upon the foregoing bond, being by me first duly sworn, upon their oaths, each for himself and not the one for the other, says: I am a householder, resident within said county of Cochise, and that I am worth double the sum for which I have become liable on the foregoing bond in unincumbered property situated in said Territory which may be levied upon and is not exempt from execution and forced sale.

GEO. H. FITTS.
W. K. MEADE.

Subscribed and sworn to before me this 4th day of March, A. D. 1891.

A. H. EMANUEL,
[SEAL.] *Clerk District Court, Cochise County, Ariz.*

Approved by—
RICHARD E. SLOAN,
Associate Justice of the Supreme Court of Arizona.

This March 5th, A. D. 1891.

(Endorsed:) Filed March 7th, 1891. J. E. Walker, clerk.

92 Title of Court and Cause.

Assignment of Errors.

And now afterwards, to wit, on the first Friday in March, in the year of our Lord eighteen hundred and ninety-one, at the October term for eighteen hundred and ninety of the Supreme Court of the United States, holden at the capital thereof, in the city of Washington and District of Columbia, comes the said Robert T. Swan, appellant, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The court erred in dismissing the appeal.

II.

The court erred in refusing to allow appellant to amend the appeal bond.

III.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said appellee against the said appellant, whereas by the law of the land the said judgment ought to have been given for the said appellant against the said appellee, and the said appellant prays that
93 the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment, dismissing his said appeal.

ROBERT T. SWAN, *Trustee*,
By N. W. STORER,
Agent and Att'y-in-fact.

(Endorsed:) Filed March 7th, 1891. J. E. Walker, clerk.

94 TERRITORY OF ARIZONA, } *ss:*
Supreme Court, }

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify the writing hereto attached to be a true transcript of the record, proceedings, and exhibits in case No. 294, of John Hill *et al.*, plaintiff- and appellee-, *vs.* H. C. Herrick *et al.*, defendant- and appellants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I have hereunto subscribed my name and affix- the seal of said court, at my office, in the city of Phœnix, in said Territory, this 7th day of March, in the year of our Lord eighteen hundred and ninety-one.

Seal Supreme Court of Arizona.

J. E. WALKER,
Clerk of said Court.

95 TERRITORY OF ARIZONA:

In the Supreme Court.

M. G. CROWLEY
vs.
JAMES REILLY. } Appeal from Cochise County.

Per Curiam:

The appellee moves the court to dismiss this appeal because of certain defects in the appeal bond.

The instrument purporting to be a bond begins with a recital of the fact that the defendant below was about to appeal from the judgment rendered against him in the action; that the clerk had fixed the probable cost of the appellate court at $40.

It then proceeds: "Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders of the county of Cochise, do hereby jointly and severally undertake and promise on the part of the defendant and appellant that the appellant will pay all damages and costs which may be awarded against him on the said appeal not exceeding the sum of three hundred dollars; to which amount we acknowledge ourselves severally and jointly bound."

The statutes make the execution and filing of a proper appeal bond prerequisite to the appellate jurisdiction of this court. Section
859 R. S. 1887 provides that "the bond shall be payable to the
96 appellee or defendant in error in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect and shall pay all the costs which have accrued in the court below or which may accrue in the appellate court." The use of the word or in the last clause is evidently inadvertent and should be read and.

The instrument purporting to be an appeal bond in this case clearly does not substantially conform to the requirements of the statute. There is no obligee named; the bond is not in a sum at least double the probable amount of costs in both the appellate and the lower courts, & it is not conditioned that the appellant shall prosecute his appeal with effect. Moreover, the language employed is ambiguous in that it is difficult to say whether it is intended that only in the event that the damages and costs do not exceed $300 shall the obligors be bound at all, or that it is intended that the liability of the obligors is to be limited to the sum named.

We have passed on these questions recently, and hope not to have occasion to do so again.

Adherence to the very simple and plain requirements of the
statute is not difficult, and no good reason can be given for
97 so radical a departure therefrom as in this case.

The appeal is dismissed, and there will be judgment accordingly.

HENRY C. GOODING,
Chief Justice.
JOSEPH H. KIBBEY, *A. J.*
RICHARD E. SLOAN, *A. J.*

TERRITORY OF ARIZONA, }
Supreme Court. }

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing is a full,

true, and correct copy of the opinion in the case of M. G. Crowley *vs.* James Reilly rendered on the 24th day of January, 1891.

Witness my hand and the seal of said court this the 7th day of March, 1891.

[Seal Supreme Court of Arizona.]

J. E. WALKER, *Clerk.*

Endorsed on cover: Case No. 14,522. Arizona Ter'y supreme court. No. 101. Robert T. Swan, trustee, appellant, *vs.* John Hill, A. B. Wild, S. B. Curtis, and Samuel Summers. Filed March 17, 1891.

155-394
155-396

Office Supreme Court, U.S.
FILED.
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

ROBT. T. SWAN, TRUSTEE,
APPELLANT,
v.
JOHN HILL ET AL.

No. 101.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLANT.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

ROBERT T. SWAN, TRUSTEE, APPELLANT,
v.
JOHN HILL ET AL.
No. 101.

BRIEF FOR APPELLANT.

STATEMENT.

This is an action brought by John Hill, A. B. Wild, S. B. Curtis, and Samuel Summers in the District Court of Cochise county, Arizona, against H. C. Herrick, Peter Crane, Carter Crane, Hop Kee, and the Boston Mining and Reduction Co. as original defendants, to establish plaintiffs' alleged prior right to the use of the waters of San Pedro river for irrigation purposes, and to restrain defendants from such use thereof to plaintiffs' injury (Rec. 1, 3). The Boston Mining and Reduction Co. having prior to commencement of the action conveyed all its property in Arizona to Robert T. Swan, trustee, upon the filing of affidavit of its former agent to that effect, said Swan was made a party defendant (Rec. 3, 23).

The several defendants made separate answer, averring (*inter alia*) that numerous other named parties were interested in the use of the waters of San Pedro river, and should be made parties defendant. This was done and amended complaint was thereupon filed against all such additional defendants (Rec. 26). The separate answers of such additional defendants were thereafter filed.

Jury being waived, the trial resulted in finding and decree marshaling priority of right to the waters of said river in following successive order (Rec. 33):

1st. Defendants H. C. Herrick and Hop Kee.

2d. The plaintiffs Hill *et al.*

3d. Defendants Aug. Noyes, Al. Noyes, Chas. Noyes, and H. M. Christiansen.

4th. Defendant Grand Central Mining Co.

5th. Defendants Peter Crane and Carter Crane.

6th. Defendant the Boston Mining and Reduction Co., and Swan, trustee, coupled with the finding (Rec. 33) " that the articles of incorporation, which are to be treated " as the charter of the corporation, show that the corpo- " ration was organized for mining, milling, and reduction " of ores, and not for the purposes of irrigation, and I " find that it was *ultra vires* to the purposes of that " corporation to appropriate water for irrigation."

The case against all other defendants was dismissed.

Motion for new trial being made and overruled (Rec. 36), notice of appeal to the Supreme Court of the Territory was given in open Court, followed by written notice of such appeal by Robert T. Swan, duly served (Rec. 36), and filing of appeal bond (Rec. 37).

Such appeal was duly docketed in the Supreme Court of the Territory (Rec. 38), and by express order of that Court continued until the adjourned term (Rec. 39).

At such adjourned term motion to dismiss the appeal

was made by counsel for the original plaintiffs because (*inter alia*) the appeal bond did not comply with the Arizona statute (Rec. 39), and upon that ground *only* the Court entered order of dismissal with costs, "for the reasons "stated in Crowley *v.* Reilley, and upon the authority of "that case," &c. (Rec. 40).

Appeal was thereupon taken to this Court (Rec. 40, 42). Jurisdictional value is fully shown (Rec. 41).

ASSIGNMENT OF ERRORS.

The relevant errors assigned are as follows (Rec. 43):

I.

The Court erred in dismissing the appeal.

II.

The Court erred in refusing to allow appellant to amend the appeal bond.

ARGUMENT.

I.

JURISDICTION.

Jurisdiction here to review the decree of dismissal entered by the Court below is well established. The decisions discriminate sharply between exercise of jurisdiction by the Court below reviewable here by appeal or writ of error and refusal of such Court to act at all wherein the appropriate remedy is by the writ of mandamus to

compel such action, but not to control its discretion while thus acting within its jurisdiction. The distinction is fundamental. Where (as here) the cause is docketed, and the Court decrees dismissal thereof because of failure to comply with statutory or judicial regulation affecting the *hearing* of the cause, appeal or writ of error lies to review such action. But where the Court refuses to act at all, or declares itself without jurisdiction to so act, mandamus is the appropriate remedy.

In *Ex parte Brown* (116 U. S. 401) the rule is clearly stated thus :

"According to the petition, the Court entertained jurisdiction of the cause, but dismissed it for want of due prosecution ; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a Court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan* (114 U. S. 174), and cases cited."

In *Ex parte Parker* (120 U. S. 737, 743) the Court below dismissed the appeal to it (1) because all co-parties had not been joined therein nor served with notice thereof, and (2) because no evidence was properly certified. In granting the writ of mandamus this Court said :

"The Supreme Court refused to hear the cause and to decide upon its merits, because it considered that the cause was not lawfully before the Court ; that the parties were not in Court for the purposes of an appeal. This presents a case for the exercise of the jurisdiction of this Court in mandamus according to the principles and practice applicable thereto. That writ properly lies in

" cases where the inferior Court refuses to take jurisdic-
" tion, when by law it ought so to do, or where, having
" obtained jurisdiction in a cause, it refuses to proceed in
" the due exercise thereof; but it will not lie to correct
" alleged errors occurring in the exercise of its judicial
" discretion within its jurisdiction."

Citing *Ex parte Brown, supra.*

In *Ex parte Parker* (131 U. S. 221) the Supreme Court of Washington Territory dismissed the appeal to that Court because not taken with the prior notice prescribed by statute. In granting the writ of mandamus this Court reaffirmed the doctrine announced in the cases cited *supra*, and, after express reference thereto, adds:

" The distinction in the two cases is obvious: in the
" one, the court below had taken jurisdiction and acted;
" but in the present case it refused to take jurisdiction."

In the application of this principle to the case at bar, it must be remembered that the *appeal* was duly taken in the manner prescribed by the Arizona law. An appeal bond *was* filed and the cause duly docketed. The decree of dismissal was based upon the Court's decision that such appeal bond was defective, and *hence* the appeal so taken and perfected should be dismissed. It is, therefore, not a case of manifest omission to comply with law—such as failure to file *any* bond—or to seasonably appeal, whereby the Court in dismissing the appeal did not exercise any discretion or pass upon any disputed question. *Contra*, the motion to dismiss was contested and argument heard (Rec. 40). Thereon the Court *judicially* determined that, *in its judgment*, the appeal bond so filed was insufficient. For *that* purpose it took jurisdiction of the cause, and its decree of dismissal was entered with costs taxed against appellant (Rec. 40). Hence the Court

exercised both jurisdiction and discretion. Its action must be reviewable here by appeal, for this Court in *Ex parte Secombe* (19 How. 9, 15) declared:

> "And we are not aware of any case where a *mandamus* "has issued to an inferior tribunal, commanding it to "reverse or annul its decision, where the decision was in "its nature a judicial act and within the scope of its "jurisdiction and discretion."

Illustrations of this doctrine are found in—

Ex parte Hoyt, 13 Pet. 279.
In re Burdette, 127 U. S. 771.
Ex parte Loring, 94 U. S. 418.
Ex parte Flippen, 94 U. S. 348.
Ex parte Perry, 102 U. S. 183.
Ex parte Burtis, 103 U. S. 238.
Ex parte Railway Co., 103 U. S. 794.
Ex parte B. & O. R.R. Co., 108 U. S. 566.

The authorities *supra* distinguish clearly between cases where by plain default the jurisdiction of the appellate Court has never attached, as where, by formal motion to docket and dismiss, the case is taken out of the operation of the appeal, and cases wherein the Court necessarily exercises jurisdiction and consequent discretion in determining disputed questions affecting the mode and form of such appeal. In present case the bond was, in fact, executed, approved, and filed. The Supreme Court of Arizona was called upon to test the sufficiency of the bond by construing the statute under which it was given. It did construe the statute, and its action can only be reviewed by this appeal. The writ of mandamus would not be appropriate, because its necessary result would be to require that Court to reverse its ruling upon the Arizona statute, and thereby

control the judicial discretion heretofore exercised by the Court. This is contrary to the office of such writ, as this Court has plainly said. The appellant is entitled to *some* remedy, and, as the decree below is against him, he can properly test the correctness of the Court's ruling upon the statute only by this appeal.

II.

Sufficiency of Appeal Bond.

Section 859, Revised Statutes of Arizona, 1887, provides:

"The appellant or plaintiff in error, as the case may be, "shall execute a bond, with two or more good and sufficient sureties, to be approved by the clerk, payable to "the appellee or defendant in error, in a sum at least "double the probable amount of the costs of the suit of "both the appellate Court and the Court below, to be "fixed by the clerk, conditioned that such appellant or "plaintiff in error shall prosecute his appeal or writ of "error with effect, and shall pay all the costs which have "accrued in the Court below, or which may accrue in the "appellate Court."

The appeal bond herein (Rec. 37) recites the fact and nature of the judgment below, and appeal taken by Swan therefrom to the Supreme Court of the Territory, and continues:

"Now, therefore, in consideration of the premises, and "of such appeal, we, the undersigned residents of the "county of Cochise and Territory of Arizona, do hereby "jointly and severally undertake and promise on the part "of the appellant that the said appellant will pay all "damages and costs which may be awarded against him

" on the appeal, not exceeding three hundred dollars, to
" which amount we acknowledge ourselves jointly and sev-
" erally bound. * * *

" Approved and filed November 16, 1889, at 1 o'clock
" P. M.

" GEO. H. DAILY,
" *Clerk.*"

The bond is in form identical with that involved in Crowley *v.* Reilly, and the decision in that case on which the Court rested its action in this case appears in this record (pp. 43, 44). After recital of the bond therein and section 859 of the Revised Statutes of Arizona, *supra*, the decision marshals the Court's objection to the form of such bond thus:

1st. " There is no obligee named."

In Crowley *v.* Reilly there was one party plaintiff and one party defendant. Hence the bond could readily name the proper obligee precisely as the statute prescribed.

But in present case there were (1) four original plaintiffs; (2) four original defendants other than the Boston Mining & Reduction Co., the predecessor in interest of Swan, trustee, and (3) nineteen new parties defendant. The decree below had ruled (1) in favor of two defendants, (2) then in favor of plaintiffs, (3) then in favor of seven other defendants, and (4) had dismissed all other defendants. Under such circumstances the appeal bond tendered by Swan clearly could not run in favor of the original plaintiffs alone. The successful defendants were equally interested, and the parties defendant dismissed from the action were likewise held by the appeal to an appearance in the appellate Court, and equally entitled to be secured for their costs. In this state of the record the condition and promise of the bond to " pay all

" damages and costs which may be awarded against him " on the appeal " certainly created a valid obligation to such of the parties to the cause who as the result of the case on such appeal should be found entitled to protection thereunder. That obligation was as binding to that effect as if each of the numerous parties plaintiff and defendant had been separately named in the bond. The law was fully met in substance and in fact. Under the conditions disclosed by this record, such assumed error of *form* cannot affect matters of substance. The bond being, in language, intention, and effect, broad enough to protect all who might be found entitled thereunder, there was substantial, and hence sufficient, compliance with the statute.

The bond is captioned with the title of the Court, the cause is described therein as "John Hill *et al.*, plaintiffs, " *v.* H. C. Herrick *et al.*, defendants," and the premise of the bond recites that Swan is "about to appeal to the " Supreme Court of the Territory of Arizona from a judg- " ment and decree rendered against him in said action, in " the said District Court, and in favor of the plaintiffs, to " the effect," &c. These recitals bring the bond within the principle announced in *Preston* v. *Hall* (23 *Gratt.*) that:

"It is not indispensable that the party to whom the " promise is made should be mentioned *eo nomine*, that " his name of baptism and surname shall be given, but he " must be in some unmistakable manner designated in " the instrument."

The bond necessarily runs to the actors in the cause opposed to the appellant. The statute of Arizona so provides, and such would be the rule in the absence of the statute. When certainty of obligees is thus established,

mere omission of names should not invalidate the instrument.

2d. The further objection is that—

"The bond is not in a sum at least double the probable "amount of costs in both the appellate and the lower "Courts." * * *

The statute requires the bond to be approved by the clerk, and the aggregate probable costs to be fixed by the clerk. In present case the bond bears the express approval of such clerk (Rec. 37), and the attendant presumption is therefore conclusive that in giving such approval the clerk found the bond sufficient in amount, and as fully meeting all the requirements of the statute.

The statute assumes that the appellant is necessarily to be taxed for *all* costs in the lower Court. Ordinarily that is true. But in present case the decree apportioned the costs between the parties, and appellant Swan was not obligated for the whole thereof (Rec. 35). Hence the bond given on his appeal could not properly be conditioned to cover "*all* the costs which have accrued in "the Court below," &c., and, the reason of the law not applying in his case, there could be no valid objection to the bond on that ground.

3d. The further objection is made that the bond "is not "conditioned that the appellant shall prosecute his ap-"peal with effect."

This condition is conclusively implied in the promise to "pay all damages and costs which may be awarded "against him on the appeal," &c. If his appeal should prove successful, no damages and costs would be awarded against him thereon, whereas adverse decision upon such appeal would carry damages and costs, and the condition of the bond would then apply thereto. The objection is

technical in the extreme. The test thereof is whether any Court would permit the obligors to evade payment under such a plea. Manifestly not. If the bond was sufficient to bind the obligors to performance of the plain promise made (and clearly it was), it was sufficient to sustain the appeal. In *Gay* v. *Parport* (101 U. S. 391) a similar objection to the bond there given under sec. 1000, U. S. R. S., was overruled, the Court observing:

"If, on the final disposition of a writ of error or appeal, "the judgment or decree brought under review is not "substantially reversed, it is affirmed and the writ of error "or appeal has not been prosecuted with effect."

4th. The final objection suggested by the Court is that "the language employed is ambiguous in that it is difficult "to say whether it is intended that only in the event that "the damages and costs do not exceed $300 shall the "obligors be bound at all, or that it is intended that the "liability of the obligors is to be limited to the sum "named."

Contra, we insist that such dual construction is impossible. Language could not be used to make the meaning plainer in limiting the liability to $300.

III.

Amendment of the Appeal Bond Should Have Been Permitted.

Assuming *any* defect in the bond as filed, same was purely technical and subject to amendment. Justice does not favor summary dismissal with consequent failure of remedy by non-enjoyment of the right of appeal. The Federal law (sec. 1000, U. S. R. S.) is equally emphatic in

requiring security on appeal or writ of error to this Court. Yet, in *Bigler* v. *Waller* (12 *Wall.* 142, 149), this Court held :

"Argument to show that the bond in this case is irregu-
" lar and defective is unnecessary, as it is clear that it
" should be given to the opposite party or parties in the
" suit, but it does not follow by any means that the ap-
" peal must be dismissed. On the contrary, it is the con-
" stant practice of the Court to allow such defects to be
" obviated by granting leave to the appellant or plaintiff
" in error to file a new bond within a reasonable time, to
" be fixed by the Court, in view of all the circumstances
" when the application is made."

To the same effect are—

Catlett v. *Brodie*, 9 *Wh.* 553.
Davenport v. *Fletcher*, 16 *How.* 142.
Anson v. *Blue Ridge R.R. Co.*, 23 *ib.* 1.
Brobst v. *Brobst*, 2 *Wall.* 96.
Seymour v. *Freer*, 5 *ib.* 822.

In *Orchard* v. *Hughes* (1 *Wall.* 73, 77) it was held that Territorial Courts are Courts of the United States to the extent that they are governed by the practice and rules applied in the Federal Courts. Hence the rule of this Court in this regard should be here applied, especially as the Territorial law is in effect and intention the precise equivalent of sec. 1000 U. S. R. S. in the matter of furnishing security upon appeal, and justly subject to the same interpretation and rule of practice thereunder.

We submit that the decree below should be reversed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellant.

IN THE

Supreme Court of the United States.

Ex parte

ISAAC L. RICE,

Petitioner.

Petition for Writ of Prohibition and Mandamus, and Motion for Leave to File the Same.

NATHAN BIJUR,

Of Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Sts., New York

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9. Prospectus of Committee, Exhibit G.
10. Readjustment Agreement of October 1, 1894, Exhibit H.
11. Bondholders' Agreement of May 7, 1894, Exhibit I.

In the Supreme Court of the United States.

Ex parte

ISAAC L. RICE,

Petitioner.

The above-named petitioner, Isaac L. Rice, moves the Honorable Judges of the Supreme Court of the United States for a rule on the Honorable GEORGE M. DALLAS, Circuit Judge of the United States for the Eastern District of Pennsylvania, to show cause why the writ of prohibition should not issue to restrain him from further proceeding upon the petition of the receivers of the Philadelphia and Reading Railroad Company, and the Philadelphia and Reading Coal and Iron Company, and of the said Philadelphia and Reading Railroad Company filed on the 25th day of December, 1894, in a certain suit pending before him, wherein Thomas C. Platt is the plaintiff, and the said Reading Companies and the Pennsylvania Company for Insurances on Lives and Granting Annuities are defendants, or upon the decree entered by him upon said petition on the 29th day of October, 1894, or the premises therein anywise concerning it further before him, and to further prohibit him from in any manner enforcing or carrying out the said decree, or from treating the same as valid for any purpose, or from making any order furthering the carrying out thereof, and, generally, from the further exercise of jurisdiction therein, and why a writ of mandamus should not issue com-

manding and directing him to require the committee named in said petition and in said decree to return and cause to be returned to their owners all securities deposited under the authority of said decree, and to cancel the assents by parties in interest given to the plan thereby authorized, or to make such other or further order in the premises as will restore this petitioner and all the parties interested or involved to their original positions and their vested former rights upon the ground that said Circuit Court had no jurisdiction to entertain said petition, nor to make the decree entered by it, nor to interfere in the premises in any manner whatsoever to the infringement of the contract rights of the parties in the premises;

Or in the alternative why a writ of mandamus should not issue from this Honorable Court to said Circuit Judge commanding and directing him to vacate the said decree and to require upon said petition that the parties in interest and affected by the action therein prayed be brought in or represented before said Court and that said Court pass upon and determine the issues that may be presented, and thereafter proceed thereon according to the rules and forms of law for such cases made and provided, upon the ground that said decree so made by said Circuit Court was made in excess of its jurisdiction, without regard to the forms of law, without the parties properly before it, without evidence and without a hearing;

And for a stay and for such other and further relief in the premises as may be just.

Washington, December 3, 1894.

NATHAN BIJUR,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Ex parte

ISAAC L. RICE,

Petitioner.

Petition for Writ of Prohibition, and Writ of Mandamus.

TO THE HONORABLE THE CHIEF-JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Isaac L. Rice, a resident of the State of Pennsylvania, on his own behalf, and on behalf of all who may hereafter join him herein, complaining of the decree made and entered by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the 29th day of November, 1894, upon a petition of the Receivers of the Philadelphia and Reading Railroad Company and Philadelphia and Reading Coal and Iron Company, filed September 25th, 1894. Said petition, however, being incomplete in its recitals, and having been made in and upon the proceedings in a certain suit begun in said Circuit Court February 20th, 1893, your petitioner, by way of premises necessary to be considered, shows the proceedings in said suit, and gives this Honorable Court to understand and be informed, as follows:

I.

Whereas in a suit brought February 20th, 1893, by one Thomas C. Platt, a resident of the State of New York, on his own behalf, and on behalf of all other holders of bonds of a like character with those owned by him, against the Philadelphia and Reading Railroad Company, The Philadelphia and Reading Coal and Iron

Company and the Pennsylvania Company for Insurances on Lives and Granting Annuities (as Trustee under the third preference income mortgage), upon an alleged default in the payment of Twenty-seven hundred and fifty dollars ($2,750) interest due upon fifty-five certain third preference income mortgage bonds of said Reading Companies held by said Platt,—A. A. McLeod, E. P. Wilbur and Edward M. Paxson were on the same day appointed receivers of said Philadelphia and Reading Railroad Company and Philadelphia and Reading Coal and Iron Company by the Circuit Court of the United States for the Eastern District of Pennsylvania, upon the application of the attorneys for said Platt and the appearance and consent of the attorneys of said defendant companies without notice to any other person or party, and upon their own bond or recognizance alone; and

Whereas the bill of complaint filed by said Platt avers, among other grounds for relief, the diversion of the income and earnings of said Reading Companies to purposes other than those limited in said third preference income mortgage, and prays for relief substantially as follows:

(*a*) For an adjudication upon the rights of the third preference income mortgage bondholders.

(*b*) That the said Pennsylvania Company, the Trustee, be directed to institute proceedings for the foreclosure of said mortgage.

(*c*) That the said Trustee be directed to enter upon and take possession of the mortgaged estates in the manner and for the purposes provided in said mortgage.

(*d*) That a decree be entered determining the fact of such default and directing the sale of the mortgaged premises.

(*e*) That receivers be appointed with full power to run and operate said railroads and other properties, and to preserve and protect the corporate franchises

and the corporate existence, and to preserve said properties from being sacrificed under any proceedings which may be taken, and for an injunction against the defendants and all other persons to restrain them from interfering with the said receiver in the management of said properties and for other and further proper relief.

(*f* and *g*) for subpœna to the defendants.

(*h*) That the amount due upon said third preference income bonds be ascertained.

(*i*) That the said Railroad Company be directed to pay what shall by such account appear to be due.

(*k*) That in default of such payment a decree of sale be made.

(*l*) for other and further relief; and

II.

WHEREAS, there were on said February 20th, 1893, and still are, existing obligations of the said Reading Companies as follows:

A. Prior lien mortgages to secure bonds to an amount of $5,241,700.

B. Consolidated mortgage to secure an issue of bonds to the amount of $24,587,500.

C. Improvement mortgage to secure an issue of bonds to an amount of $9,364,000.

D. A general mortgage covering all of the property and franchises of said companies, made January 1st, 1888, upon the termination of a receivership and a reorganization of the affairs of said companies to secure an issue of bonds bearing interest at the rate of four per cent. per annum to a maximum amount of $100,000,000, whereunder there have been issued bonds to the amount of approximately $44,000,000, and said mortgage provides for the payment of said interest on the first days of January and July in each year on the presentation of

the appropriate coupon, and further provides that in the event of default in the payment of said interest 10 per cent. in amount of the bonds then outstanding may demand the relief in said mortgage provided, including the institution of proceedings for the foreclosure of the mortgaged premises; and further provides that upon the sale of the mortgaged premises upon foreclosure or otherwise, after default in the payment of such coupon interest, the proceeds shall be applied to the payment, "first, of the interest due on, and, secondly, of the principal of, the then outstanding bonds," *pro rata*, &c., giving to the unpaid coupons a lien prior to that of the principal of the mortgage itself.

E. First, second and third preference income mortgages made to secure bonds bearing five per cent. interest to the approximate amount respectively of $24,000,000, $16,000,000 and $18,000,000 (although there have since January 1st, 1888, been issued under said third preference income mortgage $10,000,000 additional bonds, which issue the petitioner claims in a proceeding hereinafter more particularly set out, to have been illegal and in violation of said mortgage), and said mortgages provide for the payment of non-cumulative interest upon said bonds respectively, if earned, first of five per cent. upon said first preference income mortgage bonds, thereafter of five per cent. upon the second preference income mortgage bonds, and thereafter of five per cent. upon said third preference income mortgage bonds, out of the net earnings of said companies; and said net earnings are specified and described in Article IV. of said Income mortgages, which by its terms is made a covenant with each holder of any of the bonds issued thereunder, which article is contained in each of said mortgages, and which in said third preference income mortgage reads as follows:

"ARTICLE FOURTH. That the Railroad Company hereby covenants and agrees to apply the net earnings of the said Railroad Company, so far as the same may be available, after the payment of all fixed charges as hereinafter defined, to the payment of the interest up to five per cent. per annum upon the bonds hereby secured. If such net earnings of the Railroad Cnmpany available during each fiscal year for the payment of the interest on the bonds hereby secured shall not be sufficient to pay said interest in full, so much of the said interest as shall remain unearned shall not accumulate. It being expressly understood and agreed by and between the parties hereto, and by and among all the persons who shall be or become the owners of any of the said bonds, that the words 'net earnings' shall be held to signify the sum remaining of the gross profits, earnings, incomes and receipts of the property and business of the railroad company, from all sources, during each fiscal year ending the 30th of November, after deducting therefrom all the expenses of maintaining, operating, renewing, replacing and repairing its said property and premises, including such reasonable improvements thereof and additions thereto as shall be necessary for the safe, proper and economical operation of the same; and also, after deducting all taxes or assessments imposed upon or against the said property and business, or the incomes and earnings thereof, and all unsecured or other indebtedness arising from the said maintenance, operation, renewal and repair of the said premises, and that the words "fixed charges" in the bonds hereby secured shall include all existing rentals and guarantees for the railroad company and all interest charges upon its present fixed, funded and other indebtedness, including the interest on the bonds issued from time to tim[illegible]nder the general mortgage of the Philadelphia and [illegible]ding Railroad Company and the Philadelphia and [illegible]ading Coal and Iron Company, dated January 3, 1[illegible], interest on the bonds issued from time to time [illegible]der the first preference income mortgage of the P[illegible]adelphia and Reading Railroad Company and the [illegible]ladelphia

and Reading Coal and Iron Company, dated January 3 1888, and interest on the bonds issued from time to time under the second preference income mortgage of the Philadelphia and Reading Railroad Company and the Philadelphia and Reading Coal and Iron Company, dated January 3, 1888. The said net earnings, as above defined or described, shall not be diminished (except the surplus thereof remaining in any year after the payment in full of the said five per centum per annum upon the bonds hereby secured) by reason of any expenditures by the railroad company for any purposes not above mentioned, nor shall the said fixed charges include any additional fixed or other charges created subsequently hereto." * * *

The remainder of said article provides for the manner of ascertaining said earnings.

F. A collateral trust mortgage made to secure an issue of $10,000,000 five per cent. bonds, which mortgage was authorized by the stockholders upon the statement in the annual report of said railroad company for the year 1891 " that the proceeds will be expended only for improvements of and additions to the present mortgaged estates ; " and

III.

WHEREAS, since] the appointment of said receivers they have made default in the payment of three coupons of the said general mortgage bonds, to wit, upon the coupons falling due respectively July 1st, 1893, and January and July 1st, 1894, and no interest has been declared, earned nor paid upon the said income bonds since February 1st, 1893 ; and

WHEREAS, during the course of said receivership on or about the 21st day of March, 1893, as appears from the record in said suit, application was made to said Circuit Court on the part of said receivers for leave to

issue receivers' certificates to an amount in the aggregate of $5,500,000, and thereupon after public notice given, and hearing counsel for the various parties in interest, including counsel for your petitioner, but without an accounting of the affairs of said companies, permission to issue such certificates to the amount of approximately, $3,740,000 was on July 6th, 1893, granted by the said Circuit Court, the decree and the certificates themselves, however, leaving the dignity, priortiy and lien of said certificates undetermined; and

IV.

WHEREAS, your petitioner is the holder, in addition to other securities of said Reading Companies, of fifty ($50,000) of the third preference income mortgage bonds of the same issue as those alleged to be held by said Thomas C. Platt, and has heretofore intervened in said suit by verified petition filed therein on the 12th day of December, 1893, averring his ownership of said bonds and, among other matters:

1. The illegal appropriation of funds and assets of said companies by said A. A. McLeod and others prior to said receivership and the failure of said Receivers to institute proceedings for their recovery, but on the contrary their acceptance of said transactions and affirmance of the legality thereof.

2. The payment of large sums by the company prior to the Receivership, and subsequently by the Receivers, of whom the President of the Lehigh Valley Railroad Company was one, by way of rental and similar obligation contracted for since January 1st, 1888, aggregating many millions of dollars to the Lehigh Valley Railroad Company in violation of the provisions of said income mortgages and otherwise against law.

3. Other payments by the Receivers of the same

character which unable at the time of petitioner was filing his said petition to specify, since no itemized accounting had at that time, nor has one since been filed by said receivers, but as from the evidence since adduced by petitioner and various unofficial statements since made now appear to include annual payments contracted for since January 1st, 1888, either directly to, or by way of payment of the fixed charges of, certain separate and independent corporations and properties, to wit, the Reading Terminal Company to an amount of over $600,000 per annum, the Terminal Extension Company of over $100,000, the Port Reading Railroad Company of over $75,000, large payments in the guise of advances and otherwise to various leased and other lines, and exceptionally large annual payments upon equipment notes.

4. The issue under said third preference income mortgage of $10,000,000 of bonds without value and illegally, and their use for purposes expressly excluded in said mortgage.

5. Failure of said receivers to file a report upon the state, condition and circumstances of the said companies as directed in the order of their appointment, and their failure to file proper, sufficient or intelligible monthly or other accounts; wherefore, your petitioner in said petition prayed for relief as follows:

> "1. That he may be allowed to intervene in the above-entitled suit as a party defendant.
>
> "2. That said Receivers be directed to file in this Honorable Court a statement showing the present condition of said Reading Companies, together with a true and detailed list of all their assets and liabilities, as well as full and true accounts setting forth in detail the various moneys received and paid out by them, the disposition of all other assets that have come into their hands, and generally a full account of all their transactions in the premises; and that said accounts shall separately

specify the earnings and expenses of all railroad lines or other properties leased or controlled by said Reading Company, in respect to which said Company may have issued securities or incurred any obligation, as guarantor or otherwise, subsequent to the date of said income mortgages.

"3. That said accounts of said Receivers be surcharged with all payments made by them respectively, as hereinbefore alleged, illegally and in violation of the rights of the said Reading Company and said Coal Company, and of their creditors and security holders, and with any other unauthorized and illegal payments which said accounts may show, upon the proof thereof, and with the amount of moneys or with the value of all assets of said Companies unlawfully in the possession of third parties, which may have become lost, or of the possession of which said Companies have been deprived by reason of the failure of said Receivers to demand or recover the same, and with the amount of damage suffered by said Companies and their security holders by reason of the misconduct of said Receivers hereinabove set forth.

"4. That said Receivers be forthwith enjoined from making any payment upon any of the illegal contracts entered into by them, as hereinabove complained of, with said Prince & Co. or any other other persons or corporations whatsoever, for or in reference to the illegal speculations hereinabove set forth, or from making payments under or by virtue of any of the other contracts or awards hereinabove complained of.

"5. That the present receivers of the property and assets of said Reading Company and the said Coal Company be removed by this Honorable Court, and that other Receivers be appointed in their stead.

"6. That said Receivers so appointed be directed to make a thorough investigation of the administration of the affairs of said Companies for a reasonable period prior to February 20, 1893, and to report thereon to this Honorable Court; and to bring such actions and proceedings as may be necessary to obtain a just and full accounting of the use and

disposition of the moneys and assets of said Reading Company and of said Coal Company in or upon any or all of the transactions hereinabove complained of; to recover for the said Reading Companies moneys or assets illegally withdrawn, misappropriated or misapplied as hereinabove set forth or otherwise; to charge any parties who may have aided and abetted said Receivers or the officers of said corporation in their said illegal acts, or who have derived illegal benefit therefrom, and generally to secure justice for said Reading Company and its security holders in all the matters hereinabove set forth, or that may become known upon the investigation hereinabove prayed for.

"7. That the third preference income bonds, which have been illegally issued, as hereinbefore set forth, be canceled; that, if any of said bonds have been pledged in good faith as security for any valid loan, the same be redeemed at the valuation at which they have been so pledged; and that if any loss has been incurred by said Reading Company by reason of the improper issue or certification of said bonds, said Receivers be directed to bring proper action and proceeding in the premises against the parties liable therefor.

"And for such other and further relief as may be equitable and proper in the premises," and

WHEREAS, upon the filing of said petition, leave was granted to said receivers to make immediate answer thereto, and upon a hearing had before the Court upon the said petition and answer, with the understanding that said answer should be read in connection with the petition without the force and effect of an answer in Chancery, the issues hereinabove set forth were referred to the Special Master in the cause for the taking of testimony; and the exceptions of the petitioner to the report of the Master thereon are now before the said Circuit Court set down for hearing on December 4th, 1894; and

WHEREAS, from the proceedings upon said petition before the said Master and otherwise, it had appeared

(1) that said receivers had paid the expenses of promoting, during May and June, 1893, a certain plan for the rehabilitation of said Reading Companies, which had completely failed, and had otherwise taken part as receivers in favor of said proposed plan, which provided among other things for their retention in control of said Reading Companies for seven years; and also (2) that the said receivers had of their own motion and without any order of the Court fixed their own compensation and that of their counsel, in amounts which are not of record in the suit nor known to the petitioner; and (3) that they had taken part in their official capacity in a canvass for the election of a president in January, 1894, by the stockholders, in favor of the then (and present) president who had previously (to wit, in April, 1893) been appointed receiver *vice* A. A. McLeod, resigned, and had simultaneously been elected president of said company by the Board of Directors, and that they had paid out moneys as receivers in said canvass, and had permitted or directed their employees to engage therein; and that no accounting of said several payments had ever been made or filed. And said petitioner thereupon asked leave of said Circuit Court to file his supplemental petition alleging the above facts and praying for relief thereon as follows:

> "That said receivers be required forthwith to file the balance sheets and statements of said Jones and Little, respectively, now in their possession, and all other reports prepared for them or in their possession, or under their control, giving information upon the present state and condition of the Philadelphia and Reading R. R. Co., and the Philadelphia and Reading Coal and Iron Co., and of their finances; and that they cause to be prepared forthwith a full report, as required by the order of their appointment made by this Honorable Court, showing the state, condition and circumstances of said properties, truthfully, comprehensively and in

detail, in accordance with the form and suggestions of your petitioner or otherwise as to this Honorable Court may seem proper.

"That they be further directed forthwith to file full, accurate and detailed monthly statements of all their receipts and expenditures from and including February 20th, 1893, in accordance with the forms and suggestions hereinabove referred to, or such other similar form and suggestions as to this Honorable Court may seem just and proper in the premises.

"That they be further directed, either in connection with their monthly accountings or separately, to file a full and detailed account of the amounts expended by them respectively in the preparation and promotion of the plan of rehabilitation as hereinabove set forth, and in promoting the re-election of said Joseph S. Harris as president of the Philadelphia and Reading R. R. Co. and of the amounts paid by them to said Philadelphia and Reading R. R. Terminal Co. over and above the amount of receipts therefrom, other than those arising from payments made by said Philadelphia and Reading R. R. Co. to said Terminal Co.

"That their accounts be surcharged with the amounts improperly and illegally expended by them as hereinabove set forth, or as may be further shown upon the filing of said accounts, and for the other and further relief prayed for in the original petition of this petitioner, or as in the premises may seem just and proper."

And that thereupon said Circuit Court, so as not to delay the coming in of the Master's report upon the reference of the original petition, directed that said supplemental petition should not be filed at that time, but gave leave to the petitioner to renew the application upon the coming in of the Master's report, and petitioner has now given notice of such renewed application upon the hearing before the said Circuit Court of petitioner's said exceptions to the Master's report.

V.

And your petitioner further shows to this Honorable Court that,

Whereas on the 25th day of September, 1894, the said receivers, joining with themselves said Railroad Company, did upon an unverified petition apply to said Circuit Court for authority to enter into a certain agreement with a Committee, purporting to provide for a partial reorganization of the affairs of said Company, annexing to said petition the said proposed agreement, and also a certain statement or prospectus of said committee. And said petition and agreement refer to, and are based upon, two other certain agreements which were not annexed to said petition, to wit: a certain readjustment agreement, made public since the entering of the decree herein complained of, and a certain general mortgage bondholders' agreement dated May 7th, 1894, hereinafter more specifically set out, together with a certain syndicate agreement which has not been filed nor made public at all. And petitioner annexes hereto, and begs to make a part hereof, said petition of the receivers as Exhibit A, said proposed agreement, Exhibit B, said statement or prospectus of the Committee, Exhibit G, said readjustment agreement, Exhibit H, and said bondholders' agreement as Exhibit I; and

WHEREAS, on said 25th day of September, upon the presentation of said petition of said Receivers said Circuit Court made an order as as set forth in Exhibit C hereto, the essential part of which is as follows:

> "It is hereupon ordered that said petition be heard upon the 15th day of October, 1894, at ten o'clock A. M., at which time any party in interest may appear and be heard, and that there shall be an advertisement of this order by printing a copy of the same (but without ex-

hibits) in one or more of the daily papers published in the cities of New York and Philadelphia and in the London 'Times,' twice a week until such hearing;"— and

WHEREAS, on the 15th day of October, 1894, at 10 o'clock in the morning, your petitioner duly appeared by counsel in accordance with the terms of said order and opposed the granting of the prayer of said petition. But said Pennsylvania Company, trustee under said third preference income mortgage, which is also trustee under the first and second preference income mortgages, and also under the general mortgage, made no appearance and took no action in said proceeding.

And your petitioner here avers that it is impossible for the said trustee at this time to take proper or necessary action in the premises inasmuch as the interests of the holders of the bonds secured by said respective mortgages have under said contract of the receivers and by reason of the manner of promoting said plan becomes diverse and opposing as hereinafter more fully set forth.

And thereupon, as your petitioner is by his counsel advised and informed, counsel for the said Receivers, petitioners, made his argument in favor of granting the prayer of said petition and urging a speedy determination by the Court; but, after counsel for your petitioner had in argument objected to the jurisdiction of said court in the premises and was proceeding with further argument, said Honorable Circuit Judge announced that causes triable before a jury had been set down for that morning at 11 o'clock, and that, therefore, further argument in this matter was impossible, and suggested to avoid delay that the arguments of counsel, if counsel were satisfied, might be heard by the Special Master, who should then annex to his report the stenographic record of the arguments. Thereupon your petitioner's counsel asked whether the court would not first, pass upon the question of the jurisdiction, to which the

Court replied that that also might be argued before the Special Master. Thereupon said counsel did appear before the Special Master and argued in opposition to granting the prayer of said petition, in so far as said Receivers were concerned, setting forth the want of jurisdiction of the Court in the premises, the insufficiency of the papers whereon the prayer of the petition was founded, and other reasons generally why said petition should be denied, and demanded, in the event of the Court's assuming jurisdiction, that evidence should be submitted in support of the petition in the usual manner; and said counsel further argued that in so far as said company was concerned no action of the Court was necessary or proper inasmuch as the injunction contained in the order of appointment of receivers did not and was not intended to prevent said company from seeking to rehabilitate its affairs, but in terms restrained said company only "from interfering with the said receivers taking possession of and managing the property;" and

WHEREAS, within a few days thereafter petitioner's counsel learned that, owing to the frequent interruptions and general informality of the proceedings before the Master, the stenographic report of the arguments was totally incomplete and insufficient, and did immediately thereupon, to wit, on the 19th day of October, 1894, and before any report had been made by said Master, address a communication to said Circuit Judge setting out said fact and other reasons why his contentions should be heard personally by said Court, and requesting such hearing, and asking further in case the said Court should determine that it had jurisdiction, that evidence might be submitted upon the merits and generally in relation to the action prayed for by the receivers. And petitioner begs leave to refer to said communication annexed hereto and marked Exhibit F and to make the same a part of his petition; and

WHEREAS, during the course of said receivership there have been some thirty-three petitions filed by said Receivers, of which all but eleven have been referred by said Circuit Court to the Special Master in the cause for the taking of evidence, and of which eleven there was but one upon which any evidence as to extrinsic facts could reasonably have been adduced, and

WHEREAS, thereafter on the 23d day of October, the report of said Master was filed in said Circuit Court, annexing thereto said incomplete and insufficient stenographic report of the argument of your petitioner's counsel, and containing a pretended summary or statement of the argument of said counsel, which, as your petitioner is informed and advised by his said counsel, is both insufficient, incorrect and confused with the arguments of other counsel who represented entirely distinct interests, and omitting material statements and reservations of petitioner's counsel, said report recommending to the said Court that the prayer of the petition of the Receivers be granted, but said report finds and reports various conclusions of law, and also many conclusions of fact, in spite of the entire absence of witnesses, testimony or evidence of any kind, setting forth mere remarks of Receivers' counsel as facts found, and even finding facts regarding which there is no averment in the petition of the Receivers; and thereupon petitioner's counsel undertook the preparation of exceptions to the said report; but, as hereinafter set forth, had no time to file the same before the making of the decree herein, six days after the filing of said Master's report; and petitioner annexes hereto said report of the Master as Exhibit D.

WHEREAS, said committee, with which said contract with said receivers was sought to be made, is not nor are its members parties to the suit of Platt, nor to said proceeding in reference to the plan of adjustment, nor subject to the jurisdiction of the Circuit Court, except

in so far as entering into said contract with said receivers may so subject them; nor were they, nor does the petition aver them to be, owners or representatives of the owners of said Reading properties, nor of any part thereof nor of any class of the creditors thereof, nor of any parties to said suit; nor was their authority to act even for said syndicate offered in evidence to said Court; and,

WHEREAS, the holders of the several classes of securities whose respective rights and liens are sought to be affected and changed by said contract are not parties to said suit nor to said proceeding, nor do they appear therein; and,

WHEREAS, there has been no accounting of the affairs of said receivership, nor of the use by said receivers of the receipts of said companies, nor of the intended use of the proceeds of the securities sought to be sold under said contract nor a marshaling of the debts to be thereunder paid or adjusted; and,

WHEREAS, the making of said contract and generally the subject matter of said petition of said receivers are entirely without and beyond the jurisdiction of said Circuit Court,—

Yet, nevertheless, the said Circuit Court, in disregard of the premises and of the rules and forms of law and of the rights of your petitioner, did on the 29th day of October, 1894, make its decree granting the prayer of said petition and authorizing the said Receivers to enter into said agreement; and did at the same time hand down its opinion refusing the request of petitioner's counsel for a hearing, as set forth in his communication to said court, which said decree and opinion are hereto annexed and marked Exhibit E, which petitioner prays to make part of this petition; and,

WHEREAS, on the 9th day of November, 1894, your petitioner upon a verified petition made application to said Circuit Court for an order setting aside the said decree and for leave to file his demurrer, plea and answer to the said petition, and that thereupon if said demurrer or plea should be overruled, a reference be had and evidence adduced for and against said proposed action, and for a stay in the meantime; and in the alternative that said decree be opened with leave to him to file *nunc pro tunc* such demurrer, plea or answer and with leave to file *nunc pro tunc* his exceptions to said report of the Master, upon the grounds that such proceedings were had and decree made without regard to the rules and regulations of practice, and for such other and further relief as the Court might deem proper in the premises, and annexed thereto his draft of proposed exceptions to the Master's report; and the said Circuit Court thereupon permitted said petition to be filed, but denied all the prayers thereof; and

WHEREAS, as by your petitioner set forth in his said petition for the setting aside of said decree filed as hereinabove set forth, it appears that immediately upon the making of said decree said committee advertised extensively to the security holders of the Philadelphia and Reading R. R. Co. that "said Company and the receivers had been authorized by the United States Circuit Court to enter into an agreement to issue the securities and make the payments as provided for in the plan in case the same should be declared effective by the committee and Board of Managers of said Reading Company," and requested the several holders of general mortgage and income bonds and stock to sign the several agreements for them prepared assenting to said plan, and to deposit their securities thereunder; and one of the agents of said committee, to wit, the Finance Company of Pennsylvania, announced that the general mortgage bond holders assenting to the plan could now

"*collect* upon presentation their overdue coupons," and did further announce shortly thereafter that said committee had received deposits of over $4,500,000 of general mortgage bonds, and had thus "finally been so entrusted with the power of foreclosure as to enable it to secure reorganization through foreclosure, if not without it;" and

WHEREAS, since the filing of your petitioner's said petition for the vacating of said decree, said agent has issued a circular stating that "in case the junior securities accept the terms of the plan, the committee's syndicate guarantees the prompt payment of your interest up to and including January 1st, 1898." And has also advertised that the general mortgage bondholders are to retain the moneys paid for the coupons purchased now, whether the plan becomes operative or not, and that said committee controls sufficient general mortgage bonds to enable it to foreclose and that it intends to carry out its program, thus confirming the plea of your petitioner before said Circuit Court that a substantial part of the provisions of said decree or contract would become executed to the injury of your petitioner, whether said plan was thereunder carried out or not, and that one of the purposes of seeking the authority of said Court was to secure for said Committee a sufficient number of general mortgage bonds to enable it either to foreclose or threaten foreclosure, to its own ends and purposes and to the injury of your petitioner's interests in the said properties.

Now, therefore, your petitioner being aggrieved by said decree of said Circuit Court in the premises, and by the action of said Court beyond its jurisdiction, and by the manner in which said court has proceeded herein, does respectfully show that the particular injury of said decree lies in that:—

I. Said Court has, by said decree become a party to

a contract, with a committee of strangers to the cause, embodying and dependent upon a plan purporting to be for the reorganization of the affairs of said companies, which plan this petitioner regards as based upon incorrect and unwarranted statements of fact, as being insufficient in scope, unreasonable in its means, illegal and against public policy in certain features, and as proceeding upon a wrong theory or conception of the business and affairs of said companies and of the mode of administering the same, and thereby mischievously interfering with the rights and privileges of your petitioner in the premises beyond and without the jurisdiction of said Court.

II. That, contemporaneously with the conferring of its authority upon said plan and said committee, said Court has, as by its opinion appears, stated that it would not permit said receivership to continue indefinitely, and that, unless the parties in interest within a reasonable time devise some means for ending this receivership, the Court would seriously consider whether it should not be dissolved, thus substantially threatening to withdraw the protection of the Court from the property unless the present plan be adopted, the Court having in another part of its opinion, but without evidence, stated that this is the only reorganization project which is known to exist, and your petitioner submits that said action and declaration of said Court are beyond its power and jurisdiction.

III. That although said Court has authorized its receivers to enter into a contract with a committee intended to promote, or to facilitate the promotion of, a plan of reorganization, yet said Court, according to its opinion, declines to approve or disapprove said plan; and while, so declining to pass upon the merits of said plan, delegates to said committee and the Board of Managers of the debtor company the power to declare the plan effective, and thus to make the payment of

large sums by way of commission to said committee and syndicate, which payments out of the trust fund can be authorized by the Court alone and solely upon its decision that they are for the benefit of the trust fund.

IV. That said decree or contract attempts to adjudicate collaterally, without proper pleadings or proceedings at law, without evidence and without the necessary parties in court, and otherwise without jurisdiction in the premises, substantial issues, most of which have heretofore been presented in due form for the consideration and adjudication of said Court by this petitioner in another proceeding now pending and undetermined as aforesaid, and that said contract or decree virtually estops said Court from passing upon such issues to other effect than as in said contract provided.

V. That said decree or contract attempts to establish a new lien to the extent of a maximum of nine million dollars in the form of funded general mortgage coupons prior to the lien of the mortgage securing the bonds owned by your petitioner and neither contemplated in nor authorized nor permitted by said mortgage, and provides further for the redemption or payment of said funded coupons at a premium.

VI. That said decree or contract attempts to alter the obligation of said Third Preference Income Mortgage by authorizing said Receivers to make absolutely and in any event payments therein expressly postponed to the payment of interest upon said Third Preference Income Bonds; and that it is attempted thereby to authorize the diversion of income properly applicable to the payment of the coupons of said general mortgage bonds, to the payment of said charges so expressly postponed to the payment of interest on said third preference income bonds, thereby establishing said charges as prior to the said income mortgage in violation of the express provisions thereof.

VII. That said decree or contract gives an option to said Committee upon the securities in the treasury of said railroad company for the purpose of enabling them to the exclusion of all other parties, to promote a plan of reorganization, and not for the purpose of assisting the administration of the trust fund, thus precluding the promotion of any plan by your petitioner or any other parties in interest, which he or they may deem better calculated to advance the interests of said Reading Companies, and without even exacting from said parties holding said option, or from the syndicate claimed to be represented by them, any guarantee to exercise said option except when they so desire. That said option to said committee is unlimited in point of time, inasmuch as said committee has under said readjustment agreement power to extend the time within which it may declare said plan operative; and there is no obligation to purchase said collateral trust bonds, except upon said plan being declared operative by said committee and the Board of Managers of said railroad company acting in conjunction.

VIII. That said decree or contract attempts to authorize the appropriation of the proceeds arising from a sale of part of the corpus of the trust fund (to wit, the collateral trust bonds) to the payment of the Receivers' certificates, without regard to the rights of your petitioner to have such proceeds applied first to the payment of the interest due upon the fixed and other prior charges of said railroad company in order to prevent foreclosure; and without an accounting and marshalling of the debts of said companies, or any adjudication of the lien of said Receivers' certificates.

IX. That said decree or contract, together with the collateral agreements included therein, requires all holders of general mortgage bonds assenting to said plan to sign and deposit their bonds under the said agreement of May 7th, 1894, providing for the institu-

tion of foreclosure proceedings under said general mortgage; but said plan provides further that, in case said plan should fail, viz., be declared ineffective by said committee and said Board of Managers, said general mortgage bonds shall be retained under said agreement of May 7th, 1894, for the purposes aforesaid, destructive of petitioner's rights and property, although the income bonds and stock required to be deposited under said plan must, in the event of such failure, be returned to their owners, if by them required. That previous to the entering of said decree the committee known as the Olcott Committee, which had prepared and proposed said agreement of May 7th, 1894, had been unable to secure sufficient assents to enable it to institute foreclosure proceedings, or take other active or effective steps, although it had made strenuous efforts by public advertisement and otherwise to that end; but that, by means of and since advertising the authority of said court in the premises, as hereinbefore set forth, and offering thereunder to "cash the coupons" of assenting general mortgage bonds, it has been enabled to secure such assents or deposits, and is using the same to foreclose or threaten the institution of proceedings for foreclosure on or after December 31st, 1894 (the date fixed as a limit for deposits or assents under the plan), for the purpose of forcing this petitioner and his fellow security holders to pay an assessment and assent to other provisions of said plan, to which he and said other holders are radically opposed.

X. That said decree or contract, by its terms, delegates the function of declaring its provisions to be operative or inoperative to parties other than the Court and strangers to the cause, to wit, to the Committee and to the Board of Managers of the debtor company, which said delegation of its functions is entirely beyond the power and jurisdiction of said Court.

XI. That said decree or contract has no relation to the administration or preservation of the trust fund committed to the care of said Court, or to the protection of the rights of the public therein.

XII. That said plan so entered into by said Receivers, with the authority of said Circuit Court, does not provide for nor contemplate the payment or adjustment of all the debts of said Companies so as to permit the properties to be restored to their normal owners, but contemplates the continuance of said receivership, a carrying of said contract and plan by said Receivers, and yet contains provisions to be carried out long after said receivership may be terminated.

XIII. That said decree or contract authorizes the payment by way of commissions of large sums, aggregating over Four hundred thousand Dollars ($400,000), out of the trust fund and properties committed to the care and custody of said Court, not for purposes connected with the administration or protection of said trust fund and properties, or for the protection of the rights of the public therein, but contingent upon the declaration by a Committee of the effectiveness of a plan of reorganization, and that said declaration may be made, said commissions paid and the changes in said contract rights consummated even if the number of assents of general mortgage bondholders is less than the ninety per cent. necessary to insure the prevention of foreclosure, to the injury of your petitioner and the other security holders of said companies.

XIV. That under the readjustment agreement, being part of said contract of said Receivers, it is sought to establish a voting trust through deposit of stock, coupled with an irrevocable proxy, empowering the holders of said General Mortgage and said Income Bonds to the par value of One hundred million Dollars, or, in default of a designation by them, then the Cen-

tral Trust Company of New York to vote through said Trust Co. as trustee for certain of said Managers and for the President, and that said plan and the promotion thereof under said decree will confuse and forestall the action of said stockholders at the election, under the Charter of said Company, of a President and Board of Managers, on January 14, 1895, the date of the regular annual meeting.

XV. That although said Court in its opinion declares that it neither approves nor disapproves of said plan, it will, should said plan be declared effective, receive millions of dollars paid to it under and by virtue of the provisions of said plan, and of the agreement of said receivers relating thereto; and should your petitioner or any other creditor or stockholder hereafter or in any other proceeding, question in said Circuit Court, or elsewhere, the legality of any of the provisions of said plan or agreement, as, for instance, said voting trust, he may be met by the plea that said moneys were so taken and received by said Court with the full knowledge that they were paid by said parties upon the faith of and under said provisions.

And your petitioner further shows:

XVI. That the proceedings wherein said decree or contract of said Court was made, were irregular, inasmuch as said Court delegated to a Master its function of hearing and determining the issues raised; and that the manner of proceeding thereon generally, and without allowing the filing of or argument upon exceptions, and without the partes in interest before it, and the declaration by said Court that said plan "sanctions the raising of money by rightful mean, upon reasonable terms, and for proper objects," without permitting evidence to be taken,—constitutes a summary proceeding, depriving your petitioner of his rights and property without due process of law; and

XVII. That petitioner has no other remedy except as herein prayed for, although said decree or contract seeks to finally determine certain of his rights, and would constitute a cloud upon the obligation of the mortgage securing his bonds, and deprives him of his rights to have said properties properly administered; that said decree or contract, even though made by the Court, may by other parties be declared ineffective and inoperative after a large part of the mischief of which petitioner complains has been irreparably accomplished; and that even if an appeal may lie from said decree, either to the Circuit Court of Appeals or to this Honorable Court, such remedy would not be sufficient in point of time nor adequate in scope to afford just and proper relief in the premises.

WHEREFORE, the said Isaac L. Rice, the aid of this Honorable Court most respectfully requesting, prays remedy by writ of prohibition, to be issued out of this Honorable Court to the Honorable GEORGE M. DALLAS, Judge of the United States Circuit Court for the Eastern District of Pennsylvania, to be directed, to prohibit him from further proceeding upon said petition of said Receivers, and in said suit or the premises aforesaid anywise concerning it further before him, and to further prohibit him from in any manner enforcing or carrying out the said decree, or from treating the same as valid for any purpose, or from making any order further in the carrying out thereof, and generally from the further exercise of jurisdiction therein; and

That a writ of mandamus to be issued out of this Honorable Court to the said Honorable Judge, commanding and directing him to require the said committee to return and cause to be returned to their owners all securities deposited under said plan, contract, or decree, and to cancel the assents by said parties to the said plan given, or to make such other or further order in the premises as will restore this petitioner and

all the parties in interest to their original positions and their vested former rights.

Or, in the alternative, that a writ of mandamus issue from this Honorable Court to said Honorable Judge, commanding and directing him to vacate the said decree, and to require, upon the said petition of said Receivers, that the parties in interest and affected by the decree therein prayed for be brought in or represented before the said Court, and that said Court pass upon and determine the issues that may be presented, and thereafter proceed thereon according to the rules and forms of law for such cases made and provided,

And for such other and further relief as to this Honorable Court may seem just and proper in the premises,

And that in the meantime, and until the hearing and determination upon the rule herein prayed for, and the return thereto, all proceedings under and by virtue of said decree, whether on the part of said Circuit Court or of the said Receivers or of the other parties to said agreement, be stayed.

And your petitioner will ever pray.

Dated New York, December 1, 1894.

ISAAC L. RICE,
Petitioner.

NATHAN BIJUR,
Of Counsel.

STATE OF NEW YORK,
City and County of New York, } ss.:

ISAAC L. RICE, being duly sworn, says that he is the petitioner aforenamed; that he has read the foregoing petition, and that the same is true.

ISAAC L. RICE.

Sworn to before me this 1st day of December, 1894.

P. LEWIS ANDERSON,
Notary Public,
New York County.

Exhibit A.

Thomas C. Platt vs. *The Philadelphia and Reading Railroad Company* et al.	In the Circuit Court of the United States, for the Eastern District of Pennsylvania. In Equity. April Sessions, 1893, No. 1.

To the Honorable the Judges of the said Court:

The petition of Joseph S. Harris, Edward M. Paxson and John Lowber Welsh, Receivers of the Philadelphia and Reading Railroad Company, and the Philadelphia and Reading Coal and Iron Company, and of The Philadelphia and Reading Railroad Company, respectfully represents:

First. That a plan for the readjustment of the affairs of the Philadelphia and Reading Railroad Company, and the Philadelphia and Reading Coal and Iron Company has been prepared, and your petitioners have been requested to agree to unite, so far as their co-operation may be necessary, in carrying the same into effect. A copy of the said plan, and of the proposed agreement between the Committee and your petitioners, are hereto annexed as part hereof.

Second. Your petitioners further show that by the terms of the said plan, it is proposed that the holders of the General

Mortgage bonds shall be invited to sell the coupons (and registered interest) for five years, including those now in default, at par, with the accrued interest thereon, to be made by the purchasers the basis of an issue of trust certificates, with the option to the accepting holders to take such certificates at par; the time of the payment of the coupons (and registered interest) so purchased, to be extended ten years from the time of purchase, and your petitioners have been asked to make immediate payment of the accrued interest on the said coupons (and registered interest) and to further pay a guarantee commission of two and one-half per cent. upon the entire amount of interest agreed to be purchased or underwritten.

Third. Your petitioners further show that as they are advised, the interest is accruing upon the coupons from the date of maturity and default, no reasons exist why such interest should not now be paid, and it is just and equitable that a like payment should be paid to the holders of registered bonds, and such payments can be made without inconvenience, from the net earnings of the Company applicable thereto.

Fourth. Your petitioners further show that the Railroad Company is willing to enter into an agreement to pay the guarantee commission upon the amount of interest to be underwritten, in view of the probability that the plan will be effective, and if so, that it will be advantageous to the creditors and stockholders of the Company, but your Receivers only feel warranted in asking for authority to pay such commission in case the agreement to extend the time of payment of the interest shall have become effective.

Fifth. Your petitioners further show that in order to raise the amount of cash required to pay off the Receivers' certificates and secured floating debt, and to make certain necessary

payments on account of car trust and equipment notes of the Railroad Company, the said plan further provides for the subscription at par by the holders of the income mortgage bonds and stock, to an issue of $10,000,000 collateral trust bonds, and as an alternative the creditors and stockholders are permitted to pay a cash contribution equal to three per cent. on the par value of their holdings, and in order to insure the raising of the said sum as proposed, a syndicate has been organized to take, at seventy per cent. of their par value, such bonds as shall not be taken by the assenting bondholders and stockholders in consideration of a guarantee commission of two and a half per cent. on the entire issue, in case the number of income bondholders and stockholders assenting thereto shall, in the judgment of the Board of Managers of the Philadelphia and Reading Railroad Company and the Committee, be sufficient to declare the plan operative.

Sixth. Your petitioners further show that, in their judgment, the plan proposed for the readjustment of the affairs of the Reading Company is just and practicable, and if carried into effect will fully preserve and protect all rights and equities of the creditors and stockholders. The rights of the general mortgage bondholders are to be preserved as if no such agreement had been made, except that the purchasers are to agree to forbear the enforcement of their rights for ten years from the date of the purchase, and the proceeds of the collateral trust bonds being already pledged to secure the floating indebtedness of the two companies, are to be applied to the payment of such floating debt and to the payment of the Receivers' certificates, and on account of the purchase of equipment in the preservation of which all the creditors and stockholders are alike interested.

Your petitioners pray, therefore, that they may be authorized and that the Company may be permitted to enter into the agreement hereto annexed, and that in case the plan be carried into

effect, that your petitioners may be authorized to make the payments therein stipulated for.

And your petitioners will ever pray.

J. S. HARRIS,
EDWARD M. PAXSON,
JNO. LOWBER WELSH.
Receivers.

THE PHILADELPHIA AND READING RAILROAD,
By
J. S. HARRIS,
President.

Attest:
W. R. TAYLOR,
Secretary. [SEAL.]

THOMAS HART, JR.,
SAMUEL DICKSON.

September 25th, 1894.

[Here follows plan.]

Exhibit B.

MEMORANDUM OF AGREEMENT, Made and entered into this first day of November, 1894, by and between Joseph S. Harris, Edward M. Paxson and John Lowber Welsh, Receivers of the Philadelphia and Reading Railroad Company and the Philadelphia and Reading Coal and Iron Company, and The Philadelphia and Reading Railroad Company, of the first part, and Frederick P. Olcott and others, Committee, of the second part.

WHEREAS, The parties of the second part, acting on behalf of a syndicate formed under an agreement which has been exhibited to the parties of the first part, have prepared, and are about to submit to the bondholders of the Philadelphia and Reading Railroad Company, secured by the general and income mortgages, and to the stockholders, a plan for the readjustment of its affairs, under which it is proposed to purchase the coupons and interest upon the general mortgage bonds, now in default and hereafter to fall due until and including January 1, 1898, and to give the Company credit therefor for a period of ten years from the several dates of purchase, and to obtain a subscription from the holders of the income mortgages and stock of the Company, to $10,000,000 five per cent. collateral trust gold bonds, at par, and in order to insure the carrying of said plan into effect, the parties of the second part have caused to be organized a syndicate or association to advance the money to purchase said coupons and accrued interest, at par, from such holders as shall prefer to receive cash therefor, rather than to take the scrip certificates to be issued therefor, and a second syndicate or association to purchase such collateral trust bonds as shall not be taken by the assenting income bondholders and stockholders of the Company, and to pay therefor at the rate of seventy per cent. of their par value, provided that a guarantee commission of two and a half per cent. be paid to the subscribers to each of said syndicates;

NOW THIS AGREEMENT WITNESSETH:

First. The parties of the second part hereby agree, on behalf of the syndicate first above referred to, without liability except as and to the extent that they may be members of said syndicate, to buy, through the Central Trust Company of New York the Finance Company of Pennsylvania and the London County Bank of London, ten coupons of the general mortgage bonds, and the interest upon the registered bonds, with the accrued interest thereon, upon the condition that the holders of the bonds to which such coupons or interest belong shall become parties to the bondholders' agreement of May 7, 1894, and shall deposit their bonds in accordance with the terms of the readjustment agreement of October , 1894, and do further agree to hold the same for ten years from the date of purchase, if the Company shall be unable to sooner pay such coupons and interest from its earnings.

Second. In consideration of such purchase, the parties of the first part agree to pay the interest already accrued on the coupons and interest in default, and thereafter on the par value of the coupons or interest purchased, at the rate of six per cent. per annum, payable semi-annually.

Third. In consideration of such agreement, the Philadelphia and Reading Railroad Company covenants and agrees, and, in case the Committee and the Board of Managers shall declare effective the said plan of obtaining an agreement to extend the time of payment of interest, the Receivers agree to pay the said commission of two and a half per cent. upon the amount underwritten for the purchase of the coupons, the same to become payable as the coupons are purchased, or shall hereafter mature.

Fourth. It is understood and agreed that the purchasers of the said coupons and interest shall retain all rights of lien and preserve all rights of foreclosure, and that the same are not

to be forfeited, waived or impaired by reason of the proposed purchase, but no action by way of foreclosure, or otherwise, shall be brought upon the said coupons unless, first, there shall be default in the terms of this agreeement; or, secondly, there shall be a default in the covenants of the mortgage, other than in the covenants already in default; or, thirdly, a sufficient number of the junior security holders shall not consent to the readjustment agreement, to make the same, in the judgment of the Committee and the Board of Managers of the Railroad Company, effective.

Fifth. The parties of the first part hereby agree to devote all surplus earnings of the Company in excess of the amount needed to pay such charges as are now paid by the Receivers (including the necessary payments for betterments, equipment and sinking funds), together with the interest on the general mortgage bonds for any current year as shall be available in the judgment of the Board of Managers for the purpose to retiring the purchased coupons or interest at the rate of 105 and accrued interest, and in any event the Philadelphia and Reading Railroad Company covenants and agrees to retire such purchased coupons or registered interest at 105 and accrued interest, within ten years from the date of each purchase. The parties of the first part further agree to notify the parties of the second part in writing, addressed to the Central Trust Company of New York, at least forty days before the making of any payment for the purpose of retiring such coupons or registered interest, of their intention so to do, and at least thirty days before the due date of each of the said coupons hereafter to mature, of the extent to which the earnings of the Company shall be insufficient to pay the same, if there shall be any such insufficiency.

Sixth. In case the number of the bondholders and stockholders assenting to the plan shall, in the judgment of the Committee and the Board of Managers of the Philadelphia and

Reading Railroad Company, be sufficient to enable the plan of readjustment without foreclosure to be carried into effect, and the requisite contributions from the bondholders and stockholders of the Company shall be obtained, the Philadelphia and Reading Railroad Company covenants and agrees to sell and deliver, at par, such of its collateral trust five per cent. gold bonds as shall have been subscribed for by the income mortgage bondholders and stockholders of the Company, and to sell and deliver the balance thereof at seventy per cent. of their par value to the syndicate organized by the parties of the second part to purchase the same, and in consideration of the agreement on the part of the subscribers to said syndicate to take such of said bonds at the price named as shall not be taken by the assenting income bondholders and stockholders, the parties of the first part agree, in case the said plan shall be declared effective, to pay a guarantee commission of two and a half per cent. to said syndicate, upon said $10,000,000 five per cent. collateral trust gold bonds, and do further agree to apply all sums received from the syndicate, or from the income bondholders and stockholders of the Company, on account of such issue, or by way of cash contribution, to the payment of the Receivers' certificates and the secured floating debt, and the balance to the reduction of the equipment notes and car trusts, and further agree to use their best efforts to secure such extension of the balance due upon the equipment obligations, that the annual payments which the Company shall be compelled to make, shall not thereafter exceed the sum of $500,000, or such other sum as may be satisfactory to the Committee.

Seventh. In case the plan of readjustment dated October 1, 1894, should not become effective, the Philadelphia and Reading Railroad Company, one of the parties of the first part, agrees to repay to the parties of the second part all expenses incurred by them in putting forth and advertising the said plan of readjustment.

In Witness Whereof, The said Receivers and Committee have hereunto set their hands and seals, and the said The Philadelphia and Reading Railroad Company has caused its corporate seal to be hereunto affixed, and to be duly attested by the signatures of its President and Secretary, the day and year first above written.

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Receivers.

THE PHILADELPHIA AND READING RAILROAD CO.,

By

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President.

Attest:

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Secretary.

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Committee.

Exhibit C.

DECREE.

AND NOW, September 25th, 1894, the petition of Joseph S. Harris, Edward M. Paxson and John Lowber Welsh, Receivers of The Philadelphia and Reading Railroad Company and the Philadelphia and Reading Coal and Iron Company, and of The Philadelphia and Reading Railroad Company, having been presented to the Court, setting forth and praying as follows:

[Here follows petition.]

It is hereupon ordered that said petition be heard upon the 15th day of October, 1894, at ten o'clock A. M., at which time any party in interest may appear and be heard, and that there shall be an advertisement of this order by printing a copy of the same (but without exhibits) in one or more of the daily papers published in the cities of New York and Philadelphia and in the London *Times*, twice a week until such hearing.

Exhibit "D."

Forty-Third Report of the Master.

Sur petition of the Receivers and The Philadelphia and Reading Railroad Company for authority to enter into an agreement for the partial re-adjustment of the affairs of The Philadelphia and Reading Railroad and Coal and Iron Companies, and to make the payments therein provided, if the plan be carried into effect.

To the Honorable the Judges of the said Court:

I, the Special Master, to whom the said petition was referred, respectfully report as follows:

After the hearing of the argument upon the said petition, after due advertisement, had begun on October 15, 1894, before the Court, its then pre-occupation with jury trials caused it to refer that hearing to me, and the parties appearing thereupon adjourned to my office, 606 Chestnut street, Philadelphia, October 15, 1894, 12 M., for that purpose, whereat then appeared:

C. Stuart Patterson, Esq., for Mr. Platt;

Samuel Dickson, Esq., for the Philadelphia and Reading Coal and Iron Company and the Philadelphia and Reading Railroad Company, and the Receivers;

Messrs. Sulzberger, Johnson, Carey and Reeves, of counsel for the Re-organization Committee of Mr. Olcott;

John R. Dos Passos and Charles B. McMichael, Esqs., for the Fitzgerald Committee, intervening with petition on behalf of Mr. Whitney, a general mortgage bondholder;

Nathan Bijur, Esq., for the Hartshorne Committee;

Francis I. Gowen, Esq., for the Lehigh Valley Railroad Company;

John B. Gleason, Esq., for George L. Rogers, a first preference income bondholder, intervening by petition;

And when and where the argument upon said petition was proceeded with, a stenographic report whereof is hereto annexed marked "Exhibit A."

Mr. Dos Passos then presented the intervening petition hereto annexed marked "Exhibit B."

He also called upon the counsel for the Receivers to produce, and they produced, the resolution of the Philadelphia and Reading Railroad Company touching the proposed plan, a copy whereof is hereto annexed marked "Exhibit C."

A copy of the proposed plan, in the form of an agreement between the general mortgage bondholders, income mortgage bondholders and stockholders, and their committee of re-adjustment, and a copy of the proposed agreement between that committee and the petitioners, are annexed to the said petition as a part thereof.

The present Receivers have been appointed upon a class bill for foreclosure, filed by a holder of third preference income bonds of The Philadelphia and Reading Railroad and Coal and Iron Companies. They have outstanding prior general mortgage bonds, amounting to $44,491,188.77, bearing four per cent. interest, maturing semi-annually, January and July 1st, which for the past eighteen months is in arrear and unpaid. The Receivers, under an order made July 6th, 1893, authorizing them to issue Receivers' Certificates, have issued them to the amount of $3,640,000. The Philadelphia and Reading Railroad Company also owe other general, well secured indebtedness to the amount of $3,843,000, and further indebtedness, with interest, aggregating $7,533,000, for necessary equipment, for which a large part of the value thereof has been paid, leaving a valuable equity of the Company therein over the said debt therefor. The Receivers, upon the payment of the said secured general indebtedness, will have $10,000,000 of 5 per cent. collateral trust gold bonds of The Philadelphia and Reading Railroad Company, secured by stocks and bonds of its associated companies, which are a valuable and necessary part of its system, to dispose of for payment of the said classes of indebtedness, which, by reason of priority of liens, or value of securities pledged therefor, are entitled to a preference in the

disposition of the proceeds of the said collateral trust bonds, over other indebtedness of the Company.

Some of the said general mortgage bondholders have combined to enforce foreclosure of their mortgage, under due legal proceedings.

The said plan of re-adjustment proposes, in substance:

1. The formation of a committee for re-adjustment to carry out the plan, fix the time to be given for its approval by the parties in interest, with the Board of Managers of the Railroad Company to determine whether a sufficient amount of income bondholders and stockholders have assented thereto to make it effective, or to declare it abandoned, and to determine the form of the writings and do the acts requsite to carry it into effect if practicable.

2. That the general mortgage bondholders shall sell to the committee ten coupons or interest on their bonds, accruing from July 1st, 1893, to January 1st, 1898, both inclusive, the committee if they find the plan to become effective, to abandon foreclosure proceedings, unless default should occur in payment of the interest on said bonds, other than the interest already in default, or in payment of the purchased coupons or interest and interest thereon, as provided by the plan, or in payment of the interest accruing after January 1st, 1898.

3. That the income bondholders shall purchase to the amount of 10 per cent. of their holdings said 5 per cent. collateral trust gold bonds at par, paying therefor when required by the committee and depositing their bonds with the committee as security therefor, or immediately paying said 10 per cent. purchase money, and in either case receiving in exchange a proper negotiable receipt for said trust bonds when ready for delivery; or pay 3 per cent. of their holdings without receiving any of said trust bonds.

4. That the stockholders shall contribute 10 per cent. of the par of their stock, in pnrchase of that amount of said collateral trust bonds at par, or $1.50 per share without receiving any of said trust bonds, their stock to be assigned to a trustee as registered owner, and they receiving a certificate from the trustee for their equitable interest, said trustee to vote upon the said stock for one-half of the Board of Managers and President, as directed by resolution of a meeting of the general mortgage bondholders, and for the other half of the Board as directed by resolution of a meeting of the holders of the assenting trust certificates, until the coupons and interest of the general mortgage bondholders purchased by the committee be paid, after which the trustee shall vote, until payment of the principal of the general mortgage bonds, for one-third of the Board, as directed by the meeting of the general mortgage bondholders, for another third, by the income mortgage bondholders, and the remaining third of the Board and the President, by the holders of the assenting trust certificates.

5. That if the plan be abandoned and foreclosure take place, the committee shall, on re-organization by them after sale, recognize the income mortgage bondholders and stockholders assenting to the plan, or, at the option of the committee, return them their securities and amounts paid thereon.

The proposed agreement between the said committee and the Receivers and the Philadelphia and Reading Railroad Company recites that the committee, to insure the carrying of the plan into effect, has organized a syndicate to advance the money to purchase the said accrued coupons and interest on the general mortgage bonds at par from such holders thereof as prefer to receive the cash therefor, and a second syndicate to purchase said collateral trust bonds not taken by the assenting income bondholders and stockholders at 70 per cent.

of their par value, provided that a guarantee commission of 2½ per cent. be paid to each of said syndicates, and provides:

1. That the first-mentioned syndicate shall buy the said coupons and interest maturing on the general mortgage bonds, for five years from July 1, 1893, inclusive, with the accrued interest thereon, and hold them for ten years from the date of purchase, upon condition that the holders of the accompanying bonds shall sign the bondholders' agreement of May 7, 1894 (providing for foreclosure), and present their bonds to be stamped under the terms of the said re-adjustment agreement.

2. That the Receivers and Railroad Company shall pay the interest accrued on the coupons and interest in default, and thereafter semi-annually on the par of the purchased coupons and interest, at the rate of 6 per cent. per annum.

3. That The Philadelphia and Reading Railroad Company and, if the plan be duly declared effective, the Receivers shall pay the said 2½ per cent. commission upon the amount underwritten for the purchase of the said coupons and interest.

4. The purchasers shall hold them with all their rights; except of foreclosure, unless default occur under this agreement, or under the general mortgage, other than what has already occurred, or sufficient of the junior security holders shall not consent to the readjustment agreement, to make it effective in the judgment of the committee and Board.

5. That the Receivers and Railroad Company shall devote its surplus earnings to retire the said purchased coupons and interest at the rate of 105 and accrued interest, within ten years from the date of the purchase.

6. That if sufficient bondholders and stockholders shall assent to the plan to make it effective in the judgment of the

committee and board, without foreclosure, the Railroad Company shall sell and deliver its collateral trust bonds not subscribed for as aforesaid, at 70 per cent. to the second-mentioned syndicate, and pay it a guarantee commission of 2½ per cent. upon said $10,000,000 collateral trust bonds, and shall apply all sums received from the syndicate and income bondholders and stockholders to the payment of the Receivers' certificates and the secured floating debt, and the balance to the reduction of the equipment notes and car trusts.

7. If the plan of readjustment should not become effective, the Railroad Company shall repay to the said committee their expenses incurred in putting forth and advertising the plan.

Mr. Gowen, on behalf of the Lehigh Valley Railroad Company, desired to have on the record simply that it had a large claim against The Philadelphia and Reading Railroad Company and Receivers, not provided for by the plan, and that the Lehigh Valley Railroad Company did not wish to interfere with its consummation.

Mr. Gleason submitted that the proposed payment of commissions was in violation of the provisions of the income mortgages, limiting the subjects to which the earnings of the Company were to be appropriated; but upon Mr. Dickson stating that the Board would not declare the scheme effective unless a sufficient number of income mortgage bondholders and stockholders should agree, so as to substantially realize $9,750,000 from the collateral trust bonds, Mr. Gleason stated that, if convinced of this, he would withdraw his objections.

The only further opposition, after full advertisement of the application had, was from Mr. Bijur, representing the Hartshorne Committee, Mrs. Hetty Green and Mr. Isaac L. Rice; and Messrs. Dos Passos and Charles B. McMichael, representing the Fitzgerald Committee; and Messrs. Kissan, Whitney & Co., general mortgage bondholders.

It did not appear what extent of interests were represented by these committees.

Messrs. Bijur and Dos Passos submitted:

1. That the petition asked the Court to approve of what was substantially a plan of re-organization and not of administration, making the Receivers its partisans, with power to enforce assent from parties in interest, and the granting of the prayer of the petition would be misunderstood by the press and by Englishmen, under whose system such re-organizations are approved by their Courts and made obligatory.

2. That the Court has no jurisdiction or power to authorize the Receivers to become parties to any plan of re-organization, particularly if opposed, and the right of a single minority security holder must be considered as much as those of the majority, referring to the Master's 14th Report, filed April 1, 1885, in the Kelsey case; Central Trust Co., *vs.* Wabash R. Co., 25 Fed. Rep., 70; an unreported opinion of Mr. Justice Jackson in the U. S. Circuit Court of Georgia in the case of Clark *vs.* The Central R. Co., etc., rendered May 26, 1893; Schable *vs.* The Nicaragua Canal Co., etc., 59 Fed. Rep., 846, and Judge Lacombe's opinion in Fowler *vs.* Jarvis Conklin Mortgage Co., October 2, 1894.

3. That the plan requires the assenting general mortgage bondholders to sign the Olcott Committee's agreement of May 7, 1894, providing for foreclosure, which committee has thus far been unable to obtain the consent of sufficient holders for that purpose, and which will thus obtain sufficient, if the plan should not become effective.

4. That the plan does not provide in advance for its success.

5. That it still leaves the Companies in the hands of the Receivers, subject to large unadjusted claims.

6. That it is insufficient and default will again occur at the end of the five years' extension, when the Company will be depleted of assets.

7. That the Receivers would have had means for payment of the general mortgage coupons and interest, if they had not been improperly diverted therefrom.

8. That it affects liens not before the Court and charter rights not within its jurisdiction.

9. That the provisions for payment of commissions impair the obligation of the income mortgages, which limits the appropriations of earnings to other objects.

10. That the proposed price for the purchase of general mortgage coupons and interest and collateral trust bonds by the syndicates is inadequate.

11. That the provisions for the voting trust are illegal, referring to the Miss. R. Co. *vs.* State, 32 N. E. Rep., 933.

12. That the Court should first have a full accounting and statement of the Companies' affairs.

13. That The Philadelphia and Reading Railroad Company does not need the authority of the Court to make the agreements proposed by it.

Mr. Bijur also argued that a foreclosure would be disastrous to the interests of the income mortgage bondholders and stockholders, while Mr. Dos Passos argued that the Receivers' duty was to aid in winding up their trust, and having the property sold under foreclosure, as soon as possible.

The reply of the counsel for the Receivers and Railroad Company to these objections is found in Exhibit A hereto.

This scheme, if successful, offers in substance to the Receivers and the Railroad Company, for payment of the said claims of pressing indebtedness, the use of nearly $19,000,000, in the $9,000,000 from the five years' extension of the coupons and interest upon the general mortgage bonds, and $10,000,000 from the collateral trust bonds and income mortgage bondholders and stockholders upon the Receivers and the Company paying 6 per cent. interest upon those extended coupons and interest for five years from July, 1893, and 2½ per cent. commissions upon the amount of the general mortgage coupons and interest thus extended, which the holders thereof will require the syndicate to take, and 2½ per cent. commission upon the amount of the collateral trust bonds, the success of the scheme requiring, and being contingent upon, the assent of sufficient of the security holders and stockholders to make it effective in the judgment of the committee and Board of Managers. In any event, whether of success of the scheme, or of foreclosure, because of the priority of the lien of the coupons and interest of the general mortgage bonds, and the Receivers' certificates and the salvage of the securities pledged for the secured indebtedness and of the equipment, the debts which are proposed to be paid out of the said moneys to be raised, would be payable out of the proceeds of the collateral trust bonds and their security, in preference to the income mortgage bondholders, unsecured general indebtedness and stockholders. The coupons of the general mortgage bonds carry 6 per cent. interest from their maturity. Too small a part of those bonds are registered to warrant a discrimination against the small amount of interest thereon, which will not carry interest from maturity. The counsel for the Receivers state that the equipment and the other well-secured obligations proposed to be paid also carry 6 per cent. interest. The collateral trust bonds proposed to be sold carry 5 per cent. interest. No substantial offer of better prices for the assets proposed to be sold in this plan was made, much less in the mode required by Courts from parties opposing the consummation of judicial sales, in security

for a substantial better price. The scheme, to be successful, will require from the syndicates and the security holders and stockholders substantially $9,750,000 from the collateral trust bonds and $10,000,000 from the funded general mortgage interest. It seems that the commissions provided for in the plan are not unreasonable in comparison with those which the present Receivers have been authorized to pay in the following instances, to-wit:

November 24, 1893:

Speyer & Co—Loan of $3,000,000—Action of Receivers in payment of following commissions, etc., ratified.

April 24, 1893	$30,000
July 3, 1893	15,000
November 25, 1893	6,000
October 3, 1893	62,500
January 3, 1894	25,000
April 3, 1894	25,000

January 23, 1894:

Tug International—Payment of 4½ per cent. commission to Philadelphia Warehouse Company for advance of $63,000 for three years—to be refunded monthly.

January 27, 1894:

Philadelphia and Frankford Railroad Company—Issue of $250,000 bonds. Payment of $450 to Guarantee Trust Company for services as trustee, etc., and also commission of $5,000 to Pennsylvania Warehouse Company for purchasing unsettled claims amounting to $85,000.

March 2, 1894:

Steam Tug and New Barges—Advance of $380,000 for five years to be refunded in monthly payments, commission of 5 per cent.

March 5, 1894:

Coal Trust Certificates—Loan of $5,000,000 for ten years—negotiated at 97½ per cent.

It is not probable that under a foreclosure the collateral trust bonds or their security would produce more.

It is the duty of the Receivers apppointed upon a bill of an income mortgage bondholder, to pay, or provide for the interest upon the general mortgage bonds, to avoid foreclosure under it. An investigation of the causes of the existing fact that the Receivers have not the means to pay the present default upon the general mortgage interest, or the said other pressing indebtedness, will not aid the consideration of the present duty of the Court and Receivers, in the existing condition of those debts.

So far as the petition asks action by the Court and for authority to the Receivers and Company, it is entirely for the administration of certain assets in the Receivers' hands for the payment of certain pressing debts, and that authority is to be contingent upon the subsequent approval of the security holders and stockholders, all the parties in interest. That that administrative authority is asked thus contingently, and involves a partial adjustment of the affairs of the Company and a *pro tanto* re-organization, in aid of a complete re-organization, with a discharge of the Receivers, when the remaining outstanding debts shall be thereafter the more easily settled, does not impair the jurisdiction, or power of the Court in these administrative functions. As was similarly said by the Master in his 19th Report in the case of Kelsey *vs.* The P. and R. R. R. Co., made April 1, 1885, if there were no other obstacle than the doubt as to the success of the plan, the Receivers might be properly, in advance, authorized to consummate it, if it should prove effective. If the plan involved a complete re-organization and a discharge of the Receivers, the authority asked for could await the consummation of the plan, but it is because the Receivers are to continue, that the plan becomes only one of administration, so far as the action of the Court is concerned. The authority asked for is the same in character which was granted by Judge McKennan in the Central R. R. Co. of New Jersey *vs.* The Lehigh and Wilkesbarre Coal Co.,

in the Circuit Court of the Western District of Pennsylvania, in its order of April 2, 1887, and September 7, 1878, and which was given in the present case March 5, 1894, upon the 29th Report of the Master, authorizing the issue of $5,000,000 6 per cent. certificates, upon the security of the coal and coal accounts. Even looking at the plan in the aspect of re-organization, while it is the duty of the Court and the Receivers to be strictly impartial between rival committees, plans and interests, and therefore in Schable *vs.* The Nicaragua Canal Co. etc., 59 Fed. Rep., 846, (which was a stockholder's motion for an order on the Receivers to permit him to inspect the Company's books, to obtain material to convince other stockholders that they should oppose a proposed plan of reorganization which the Receivers had commended, and who refused the inspection because the object of the petitioner was to defeat the plan), Judge Lacombe said in reference to that condition of things: "The theory of a receivership such as this is that the court takes possession of the assets of the corporation with the intention of distributing them equitably among all entitled to receive, without exposing creditors and stockholders alike to the heavy sacrifices which would be likely to occur should the property as an entirety be broken up and sold, bit by bit, as the result of a ruinous race of diligence between creditors. Having the securities in its possession, the court retains them until they can be properly marshaled, the claims of all ascertained, the property converted into money, and the same distributed equitably according to the rights of all parties. Frequently, before this termination of the proceeding is reached, some plan of reorganization, satisfactory to nearly all interested, and abundantly protecting the full legal and equitable rights of those not entering into it, is perfected, and the receivership terminates by a sale of the property to some new corporation, or to some committee organized under such plan."

"Whether there shall be a new organization formed of stockholders, bondholders or creditors, with what respective interests,

and upon what terms, is one that shall be left for the determination of the interested, without interference in any way by the court, or its officers. The court in these cases is a harbor of refuge, not a repair shop. It will hold the property of the corporation safe from outside attacks, and in proper cases will keep its business going, so that whatever value there may be in the business, *qua* business, may be preserved for all concerned; but it will not undertake, either itself, or by its officers, to reorganize the old corporation, or to create a new one, or to solicit subscribers to some syndicate of prospective purchasers. If rival and discordant interests between the parties interested in the property produce conflicting plans upon which they cannot agree, it is the Receivers' duty to stand absolutely neutral between all, giving to no one any preference or advantage over the other, and according equal facilities to every stockholder, whether he holds a single share or ten thousand. And if the persons interested cannot within a reasonable time provide a purchaser, or competing purchasers of the property, the court will sell it, upon such advertisement, at such time and upon such terms of sale, as courts usually adopt to secure competition and a fair price;" and in Clark *vs.* The Central Railroad Company, Judge Jackson, and in Fowler *vs.* The Jarvis Conklin case, Judge Lacombe, are stated to have used similar language, although I have not had the opportunity of learning the questions and their conditions involved in those cases; and in the Kelsey case, the Master, April 1, 1885, upon the Receivers' petition for authority to pay a coupon upon the convertible adjustment scrip of the Railroad Company, *inter alia* to help a scheme of reorganization, finding that the authority was not justified as an act of administration, added, "Neither am I satisfied that it is within the province of the court to intervene for the advancement of the negotiations of the party in interest for an amicable arrangement of the affairs of the corporations. As has been said by the court (opinion in matter of Fourteenth Report): 'A reasonable time should be afforded to the creditors and stockholders

of the Railroad Company to mature a plan for the adjustment of its indebtedness;' but I think that, in maturing any such plan, they must be left to act for themselves, upon the situation as it exists, and that the court cannot be expected by directions to the Receivers to assist them or to advance the views of any portion of them;"—yet in the Central Trust Co. *vs.* The Wabash, &c., Co., 25 Fed. Rep., 70, where, pending a Receivership under foreclosure proceedings upon a railroad mortgage, the bondholders had formed a scheme of reorganization upon foreclosure and sale, and incurred expenses of advertising, etc., and the mortgage trustee petitioned the court for an order upon the objecting Receivers to pay those expenses, they having no surplus funds for the purpose, Judge Brewer orally denied the application for that reason, stating also that there was no certainty that the scheme would be carried out, but adding that if there were any surplus moneys in the hands of the Receivers, perhaps there would be no impropriety in their advancing it; and in Pollitz *vs.* The Farmers' L. & T. R. Co., 53 Fed. Rep., 210, the court confirmed a plan of reorganization which was made effective against a minority opposition. And a Court of Equity in foreclosure proceedings upon railroad mortgages, in view of the number and variety of persons and interests to be affected, and their probable sacrifice without combination for their protection, will facilitate combinations and schemes of reorganization to the end that a small minority of interests shall not enforce unreasonable and inequitable concessions from the majority, or the majority crush out or subject to disadvantage the rights of the minority. See Sage *vs.* R. R. Co., 99 U. S., 334; Carey *vs.* Houston, &c., Co., 45 Fed-Rep., 438; Robinson *vs.* Phila. & Reading R. R. Co., 28 Fed. Rep., 340; Cook on Stockholders, 3d Ed., Sec. 886. The rights of a single minority security or stockholder are therefore not necessarily the same, whether in minority or majority, in view of those different relations.

Under the present petition there is no question of rival plans of organization. There is no other pending scheme to

avoid the impending foreclosure. So far from the Receivers acting, or this petition asking for authority, otherwise than with strict impartiality to the several interests involved, the refusal of the prayer of the petition would aid its opponents in depriving the whole body of the rest of the security holders and stockholders, of the opportunity of approving and consummating the scheme, and the Receivers have proceeded as follows, to wit: The Olcott Committee having issued a circular to the security holders, stating, "The undersigned, at the request of a large amount of the above-mentioned bonds, have consented to act as a Committee to take steps to procure the payment of the interest upon the bonds in cash, to resist any attempt to increase the principal of the mortgage debt, and, if necessary to accomplish these objects, to have the mortgage foreclosed and to prepare a plan for the reorganization of the property;" and the Fitzgerald Committee, a circular stating, "No one interested in the property can claim further delay or leniency from you. It is not proper that the property should remain in the hands of Receivers indefinitely, and the committee is advised that the Court having jurisdiction must soon intervene and compel the adjustment of its affairs. If the Receivers cannot pay the coupons upon the general mortgage bonds, you should take the property covered by the mortgage, which is believed to be fully ample to satisfy your claims, and the committee advises that it is the interest of the bondholders to forthwith demand an enforcement of their rights under the mortgage," the Receivers, May 3, 1894, issued a circular, found at page 9 of "Exhibit A" hereto, to the stock and bondholders of the Company, apprising them of the situation respecting the pending foreclosure, and stating, "but it should be distinctly understood that it is essential to the efficient and successful conduct of the business of the two companies, that sufficient funds should be ultimately supplied in some way to protect the floating debt and equipment, as well as to pay the general mortgage interest. In the securing of this amount the Receivers and management will unite with any

body of creditors, or shareholders to the best of their ability, and will cheerfully give the benefit of their assistance in any effort to make the burden of providing for it as light as possible." There being also two organized bodies representing income mortgage bondholders, of which Mr. Mertens and Mr. Hartshorne were respectively chairmen, the Receivers on May 7, 1894, wrote them as follows: "The Receivers of The Philadelphia and Reading Railroad Company, as the more immediate representatives of the third preference income bondholders, at whose suit they were appointed, and the management, as the representatives of the stockholders, have felt it their duty to do all in their power to pay or arrange for the interest upon the prior mortgages of the company; and with this view they have communicated, from time to time, with the holders and representatives of the holders of the general mortgage bonds, in order to secure their assent to the funding, or sale of their coupons, so as to avert the institution of foreclosure proceedings, and the imposition of any assessment upon the security holders represented by you. You are aware, however, that the two New York committees of general mortgage bondholders have declined to recommend the concession asked for, and have called for the deposit of the bonds, with a view to foreclosure.

In view of this action, the undersigned beg to tender to your committee the assurance that they understand it to be their duty to give to your committee any assistance in their power, in the way of information, suggestion or otherwise, and generally to co-operate, if requested, with your committee, and any other income mortgage bondholders or stockholders, in devising means to protect their interests.

To avoid misapprehension, however, it should be added that they also understand that it is equally their duty to give like information to the holders of the general mortgage bonds and their representatives; and that the Receivers, at least, are not called upon, or entitled to regard themselves as in any sense parties to any litigation that may be instituted. As the repre-

sentatives of the corporation, the management will, of course, endeavor by all proper methods to protect the interests of the stockholders." And at the present hearing Mr. Welsh, on behalf of the Receivers, stated that if they could get from any responsible body any proposition that they believe to be for the benefit of the property, they would apply to the Court to have it carried out.

That the granting of the prayer of the petition may be misunderstood by the parties in interest, who are alone concerned, is not probable, and if it were, that fact, or that they will thereby authorize the Olcott Committee to foreclosure, should the plan prove unsuccessful, I do not think should prevent the action of the Court otherwise proper.

That the plan disposes of a large amount of assets, I do not think makes it unadvisable, as it also disposes of a commercially equal amount of indebtedness which would in any event absorb the proceeds of those, or an equal amount of other assets.

I do not think that any lien not before the Court, or charter rights will be affected without the consent of those interested, unless of a very small minority, whose rights would be necessarily entirely protected in the usual manner in such cases.

I think that the provisions for commissions are only an element of the net price to be obtained for the assets to be disposed of, and do not impair the obligation of the income mortgages.

I do not think that the provisions for the voting trust are a ground for objection to the granting of the prayer of the petition. Such a voting trust was held valid in the fully considered case of Mobile & Ohio R. R. Co. *vs.* Nicholas, 98 Alabama R., 92; and Ervin *vs.* The Philadelphia and Reading Railroad Co., etc., reported in 7th Railway and Corporation Law Journal, page 87,[1] fully quoted with approval in Beech on Private Corporations, Sec. 306, and notes, decided in 1890 in the Court of Common Pleas No. 2 of Philadelphia County, in which the opinion was given by Judge Hare, and Judges Fell

[1] The same case is reported as Shelmerdine *vs.* Welsh in 20 Phila. Rep., 199.

and Pennypacker concurred, in which the plaintiff sought that court, as a court of equity by injunction, to prevent the voting trustees from casting the vote of the stock of the persons creating that trust, which case was approved by the Supreme Court in the Commonwealth *vs.* Dalzell, 31 W. N. C., 301,[2] which case decided that the Act of May 7, 1889, P. L. 102, on this question, is merely declaratory of the prior law. See also Burgess *vs.* Seligman, 107 U. S., 29. The bondholders, if they do not wish the benefit of the voting trust, can decline it. *Non constat* that any shareholder will object, and if he should, the question will then arise, while the provisions of the general mortgage would enable its beneficiaries, through their trustee, on default, to take possession of and manage the property.

I do not think that a full accounting, or a statement of all the affairs of the Company, is necessary for the proper consideration of the questions involved in this petition.

The Philadelphia and Reading Railroad Company is, of course, a proper party to the present petition, in view of its rights to be affected and obligations to be created, and of the injuntion issued against it when the Receivers were appointed.

GEO. L. CRAWFORD,
Special Master.

I am therefore of the opinion that the prayer of the petition should be granted, and recommend the following order:

ORDER.

And now, to wit, 1894, it is ordered that The Philadelphia and Reading Railroad Company and the Receivers be, and they are hereby authorized to enter into the agreements annexed to their petition filed September 25, 1894, respecting the plan for the partial re-adjustment of the

[2] Reported also in 152 P. S. R., 217.

Company's affairs, and in case the plan be carried into effect, to make the payments therein stipulated for.

GEO. L. CRAWFORD,
Special Master.

October 23, 1894.

After the hearing adjourned, Mr. Bijur sent me the copy of a petition hereto annexed marked "Exhibit D," which is addressed to the Court and not covered by the present reference, but is herewith reported for such action as the Court may deem proper; and he also sent me the brief hereto annexed marked "Exhibit E," which I have considered in the foregoing report.

GEO. L. CRAWFORD,
Special Master.

Exhibit E.

In the matter of the petition of the Receivers and the Railroad Company filed on September 25, 1894.

At the time which had been appointed for hearing this petition, several counsel appeared on behalf of parties interested; but, owing to a change which the court had been constrained to make in the order of its general business, the discussion of this particular matter, though commenced, could not then be concluded. To avoid delay and in supposed relief of counsel, some of whom were not residents of Philadelphia, I suggested to them that the petition might be referred to the Special Master, and that their arguments in the Master's office could be stenographically reported; and I added that, if this course were adopted, those arguments would be considered on the coming in of the Master's report as if they had been made in court. This suggestion was accepted by all the counsel present, and thereupon the order of reference was made, and the Master's report, including the arguments at length, has now been filed. Under these circumstances I do not feel at

liberty to comply with the request for a further hearing which has been made in a letter addressed to me by one of the counsel who was a party to the arrangement I have mentioned. The case presented by the petition and the contentions of those who oppose the granting of its prayer must now be decided.

I have considered this application with more than ordinary care, for with regard to some of the principles which counsel have invoked against it, as well as to the magnitude of the interests to be affected, it is one of especial importance, but full investigation and mature reflection leave me in no doubt as to the correctness of the conclusion reached by the Master. To what he has submitted in support of that conclusion nothing need be added; but with respect to one subject, which has been urgently pressed upon my attention, a few words will be said to avoid all possibility of misunderstanding. The order now to be made does not approve the proposed plan of re-organization, nor is either approval or disapproval thereof to be implied from it. The question of the wisdom and expediency of adopting any such scheme is for solution and determination by the persons interested, and no attempt to coerce their judgment or control their action should be made either by the court or the Receivers. But nothing of that sort is involved in the authority now asked and given. It imposes no constraint, but leaves those who have the right to accept or to reject the plan referred to wholly free to do the one or the other, as they may see fit. It sanctions the raising of money by rightful means upon reasonable terms and for proper objects, and it is not a valid ground of objection to it that it also renders feasible, in case of due acceptance, the only reorganization project which is known to exist. The Receivers should not enlist on either side in conflicts amongst those interested in the property they have in charge, but the neutrality, which it is their duty to observe, is not departed from by facilitating any plan which may be proposed for the general benefit, provided, that to all alike, and with regard to every plan advanced

in good faith, the same facilities be indifferently accorded; and the court, whilst it will not pass upon the comparative merits of rival schemes of re-organization, will regard with satisfaction any and every legitimate effort to terminate this receivership. It has now continued for nearly two years, and it will not be allowed to continue indefinitely. The appointment of Receivers is an extraordinary remedy, and should be a temporary one. It is a beneficent one in many cases, but any unnecessary and futile protraction of the period of legal custody is, in any case, a grave abuse and a great evil. This is not said with reference to any particular plan of re-organization, but because I deem the present occasion a proper one for making it distinctly understood that if the parties in interest do not, within a reasonable time, devise some means for ending this receivership, the court will seriously consider whether it should not be dissolved.

The order recommended by the Master will be entered as the decree of the court.

GEO. M. DALLAS,
Cir. J.

October 29, 1894.

October 29, 1894. Since the foregoing was written and delivered to the Clerk of the Court, my attention has been called to certain exceptions on behalf of Henry H. Whitney, which, I am informed had been filed about thirty minutes earlier. The points they present have been, in my opinion, sufficiently considered and rightly disposed of; and it is to be noted that the learned counsel by whom they are interposed appeared and were heard before the Master under the arrangement I have already fully stated, and all the arguments returned with the report have been carefully read and considered. Therefore, these exceptions are dismissed.

GEO. M. DALLAS,
Cir. J.

And now, to wit, October 29, 1894, it is ordered that The Philadelphia and Reading Railroad Company and the Receivers be, and they are hereby, authorized to enter into the agreements annexed to their petition filed September 25, 1894, respecting the plan for the partial re-adjustment of the Company's affairs, and in case the plan be carried into effect, to make the payments therein stipulated for.

Exhibit F.

NEW YORK, October 19th, 1894.

PLATT v. P. & R. R. R., &c.

HON. GEORGE M. DALLAS, Circuit Judge.

Matter of the Petition of the Receivers in relation to the Olcott-Earle plan.

DEAR SIR—Having appeared before the Special Master last Monday, I feel it my duty to call your attention to reasons why there should be a full argument before yourself in the above matter.

The proceedings before the Master were, as was perhaps inevitable under the circumstances, informal. Owing to this the arguments were frequently interrupted, and, as I feared during the hearing and have since learned definitely, the stenographic record, notwithstanding the expertness of Mr. Brailey, fails to present the contentions of the respective Counsel. It will, therefore, be impossible to lay before you an accurate presentation of the arguments adduced either for or against the receivers' petition.

Under these circumstances, and before the Master has reached a conclusion, I beg to urge upon you the necessity of hearing the plea of both sides from their respective advocates, as certainly the Master, independently of the record, cannot undertake to present adequately opposing contentions, particularly those to which he may find adversely. The hearing was of value in so far as it clarified and concentrated the issues involved, but when it comes to a final determination of a question of so great importance I cannot refrain from begging you to hear in person the arguments *pro* and *con*.

The view which counsel for the receivers seem to take of the present application is:

1st. That the Court may authorize its receivers to approve or join in a plan of rehabilitation.

2nd. That so broad a rule is not necessary in the present case, inasmuch as the action now prayed for is merely an administrative measure.

The first proposition I was prepared to contest. The second, I must confess, surprised me, as there was nothing in the moving papers to indicate that such was the legal basis of the petition. On the contrary, the petition itself speaks invariably of a "plan of readjustment," and prays for action of the receivers in connection therewith, the receivers even setting forth that, in their judgment, the plan is just and practicable. In fact, it is sought to justify the action of the Court in the premises by the plea that the contract to be authorized would not become operative until the consent of the security holders to the plan had been obtained. How can a necessary administrative measure of a receivership be dependent upon the consent to something else of parties who are not even in Court?

The plea that the action of the Court does not amount to approval of the plan, because such plan shall not be effective unless the security holders consent thereto, is in itself fatal to the entire application.

First. The Court has no jurisdiction over hypothetical propositions, and, so far as my experience has gone, courts invariably refuse to entertain or even consider conditional applications. What would be the status of a party aggrieved by such action? If he waits until the condition is complied with the mischief is done. He cannot appeal from or take other measures against such action, because nothing has been done.

Second. The consent of *all* security holders is certainly not demanded in the plan. What, then, shall be

said of the rights of the non-assenting security holders which are in the hands of the Court and may have been precluded by the action taken.

THIRD. A conclusive answer to the plea, however, is that it is totally incorrect, for the very language of the contract which the receivers ask leave to execute, in sections 4 and 6, is that said contract, viz., action of the receivers, shall become effective whenever, *in the judgment of the reorganization committee and the Board of Managers*, the plan shall be sufficiently supported to be carried into effect. Will a Court abrogate its functions in favor of a Committee and a Board ?

I must say, with all due respect to the parties concerned, that the application appears to me to be an attempt to draw the Court, through its receivers, into, as it were, a partnership with the reorganization committee. So far as my experience and all the books that I have examined go, I have not been able to find any action by any Court like that prayed for in the present petition. By reason, therefore, of the importance of the action in question, and what I regard as the dangerous precedent sought here to be created, and in view of the enormous interests involved in a step so comprehensive, I earnestly urge upon you the necessity of a full hearing before yourself in Court, prior to any decree in the premises.

Should you, thereafter, determine that it is a matter upon which intervention of the Court may properly be solicited, it appears to me to be self-evident that the issues should be referred to a Master, in order that evidence may be taken, as to the exact character of the relation to be established between the receivers on the one hand, and management and the committee on the other, as to the value, importance and meaning of the action to be taken ; and as to the character and merit of the plan itself.

A memorandum of authorities on the non-interposition of Courts in matters of this kind has been handed by me to the Master at his request.

I have sent copies of the above letter to the Master and to the respective counsel for the receivers and the committee.

Very respectfully yours,

(Signed) NATHAN BIJUR,

Counsel for Richard B. Hartshorne, Henry T. Carey and Jacob Scholle, committee of Reading Security holders.

ISAAC L. RICE and
HETTY H. R. GREEN.

Exhibit H.

AGREEMENT

FOR THE

READJUSTMENT OF THE AFFAIRS OF THE PHILADELPHIA AND READING RAILROAD COMPANY.

Memorandum of Agreement made the first day of October, 1894, by and between Frederic P. Olcott, of New Jersey, Adrian Iselin, Jr., J. Kennedy Tod, Henry Budge, Thomas Denny, all of the City of New York, and George H. Earle, Jr., Sidney F. Tyler, Samuel R. Shipley and Richard Y. Cook, of Philadelphia, in the State of Pennsylvania, PARTIES OF THE FIRST PART, and the various other parties being holders of the general mortgage bonds of the Philadelphia and Reading Railroad Company whose names are subscribed hereunto, each subscriber for himself and neither for the other, PARTIES OF THE SECOND PART; and the various other parties whose names are subscribed hereto, being the holders of income bonds or stock of the Philadelphia and Reading Railroad Company, each subscriber for himself and neither for the other, PARTIES OF THE THIRD PART,

WHEREAS, the Philadelphia and Reading Railroad Company was originally chartered by the State of Pennsylvania to operate a railroad under the laws of that State, and has obtained and is the owner of certain valuable corporate rights, franchises and privileges;

AND WHEREAS, owing to a succession of misfortunes the said corporation has fallen in arrear in the payment of the interest due upon its four per cent. general mortgage bonds, and has been unable to pay the same for the last eighteen months, and is now in the hands of Receivers, who have been authorized by the Court to issue Receiver's certificates secured upon the property of the Company, and who have issued such certificates to the aggregate amount of $3,640,000 with interest;

AND WHEREAS, the Railroad Company has also incurred other general indebtedness to the aggregate amount of $3,843,000, with interest, and has further incurred an indebtedness aggregating, with interest, the sum of $7,533,000 for the purchase of necessary equipment;

AND WHEREAS, certain of the general mortgage bondholders have entered into an agreement providing for the conduct of foreclosure proceedings against the property and the prosecution of the same either to a sale or a strict foreclosure and their purchase or acquisition of the property of the Railroad Company; and such proceedings have been threatened and are about to be begun; and whereas such foreclosure proceedings, if persisted in, are liable to lead to litigation and to the sacrifice and deterioration of the value of the property and to great delay in the resumption of the regular legitimate operations of its road; and as such foreclosure may result in the total destruction of the value of the income bonds and of the stock of the Philadelphia and Reading Railroad Company, it is therefore deemed expedient that a scheme should be devised to be assented to by the stockholders and by the various classes of affected security holders of the said property, by which the debts of the Railroad Company above enumerated may be paid without ending the corporate existence or corporate power of such Railroad Company, and without putting an end to or limit upon its corporate privileges;

NOW THIS MEMORANDUM WITNESSETH, that the parties hereto have agreed, in consideration of the mutual covenants herein contained, to and with each other in the form or manner following:

FIRST.—The said Frederic P. Olcott, Adrian Iselin, Jr., J. Kennedy Tod, Henry Budge, Thomas Denny, George H. Earle, Jr., Sidney F. Tyler, Samuel R. Shipley and Richard Y. Cook are hereby appointed a committee for the purpose of carrying out this readjustment agreement and have agreed to act as such Committee. Said Committee may, from time to

time, add to their number to any extent deemed advisable by a majority of the members thereof. In case a vacancy shall at any time occur in said Committee by death, resignation, or otherwise, such vacancy may be filled by a majority of the other members of the Committee, and such successors or additional members shall have all the power and authority under this agreement that they would have had if they had been named herein as original members of said Committee. The act of a majority of said Committee, at any meeting duly called, shall be considered the act of the Committee, but no member of the Committee shall be individually pecuniarly liable, nor liable for the acts of any other member, or for anything but his own willful misconduct. Said Committee are hereby expressly authorized and empowered to fix and to extend the time or times within which this readjustment agreement is to be declared effective; to decide finally and exclusively, or if they shall see fit, in conjunction with the Board of Managers of the Railroad Company, whether or not a sufficient amount of the income bondholders and stockholders have assented thereto to make the same operative and binding; and said Committee are given express authority to declare the plan non-effective and to abandon the same, notwithstanding the assent of any number of income bondholders or stockholders thereto, in the event that they are unable to make such contracts as they may deem necessary with the Receivers of the Philadelphia and Reading Railroad Company or with the Philadelphia and Reading Railroad Company in fulfillment of the objects of this agreement; they are further given express and sole authority to determine the form of the various bonds, receipts, certificates and instruments which may be required in the course of carrying out this agreement, and in all other respects are expressly authorized to construe this agreement, and their construction of the same shall be final. The said Committee acting under this instrument are hereby vested with full power and authority to execute the provisions of this plan of readjustment; to supply any and every defect in any and every case which is unprovided for in its terms, and to

do anything and everything that is in their judgment proper to carry out its provisions, and may in the transaction of business call themselves the Committee of Readjustment of the Philadelphia and Reading Railroad Company, and when acting in that name, are to be considered as acting as the attorneys, agents and managers of the general mortgage bondholders, the income bondholders and the stockholders, who may become parties to this agreement, and as such, the said Committee are hereby authorized and empowered, as their attorneys and in their names or otherwise, to take such proceedings, give such directions, execute such papers, and do such acts under this agreement or otherwise, as said Committee may consider judicious in pursuance of the purposes of this agreement. The said Committee are expressly given full power and authority to fix their own reasonable compensation and in behalf of said principals or their own to make contracts with the Railroad Company for the payment of the same and of their own expenses and the reimbursement to them of such payments and expenditures as shall have been made by them in good faith for the purpose of carrying out this readjustment agreement and accomplishing the purposes of the same, which contract shall be final. The said Committee, as individuals, may also sign this agreement as holders of said securities, and shall be entitled to all the rights and benefits accruing to any other subscriber.

The present or future members of this Committee may be or become pecuniarily interested in any of the property or matters which are the subject of this agreement, or may become members of any syndicate formed in connection therewith. The members of any such syndicate shall be considered as acting in their own behalf, and for their own profit solely.

SECOND.—The subscribing general mortgage bondholders, parties of the second part, in consideration of the contribution or contributions hereinafter mentioned, to be made by the parties of the third part toward the payment of the debts of the Railroad Company, have agreed and

do hereby severally agree, each for himself, to sell to the Committee, or their assignees, at the respective due dates thereof the ten coupons or in the case of registered bondholders to assign to the Committee the interest thereon attached to their bonds at the par value thereof, which are already in default, with accrued interest, beginning with that which became due July 1, 1893, or which may hereafter be in default, down to and including that due January 1, 1898, as the said ten coupons or interest respectively fall due, provided that the Railroad Company shall (in the judgment of its Board of Managers, or in case the plan does not become operative, in the judgment of the Committee), be at such due dates unable to pay the said coupons or interest out of its annual earnings. If registered interest be purchased the holders of the bonds on which the same shall become due shall execute all assignments that shall be necessary to vest the title thereto in the purchasers.

The Committee agree to issue or cause to be issued ten year general mortgage equitable interest certificates, secured by such purchased coupons or registered interest, to be retired out of the surplus earnings of the Railroad Company at 105 and accrued interest; and any subscribing general mortgage bondholder may take such certificates at par, in lieu of cash, in payment for the coupons or registered interest sold to the Committee as aforesaid. The Committee may dispose of all certificates not so taken, in any manner they deem proper.

The general mortgage bondholders in consideration of the contributions of the junior security holders above referred to towards the payment of the debts of the Railroad Company and of the transfer of the stock as herein provided, further agree, that the Committee may in their discretion postpone the institution of foreclosure proceedings, under the powers conferred upon them by the general mortgage bondholders in accordance with the agreement of May 7, 1894, and in case the Committee shall decide that this readjustment agreement has become effective then in that case that such proceedings may be abandoned—excepting that in the event of a new default in the covenants of the general

mortgage other than the covenant already in default, or in the event of non-payment of the purchased coupons, or the purchased registered interest, and the interest on the same by the Railroad Company or its Receivers, in accordance with the contract in respect thereto by and between the said Committee and such Receivers and Railroad Company, or in the event that the general mortgage interest accruing after January 1, 1898, shall not be paid by the Company, in either of which cases the Committee may proceed with the foreclosure of the general mortgage.

THIRD.—The subscribing income bondholders hereby agree to deposit their bonds with the agents of the Committee, and at the time of such deposit either to agree to contribute ten per cent. of the par value of the bonds so deposited for the purchase of five per cent. collateral trust bonds of the Philadelphia and Reading Railroad Company at par and accrued interest, or of scrip exchangeable for such bonds in amounts of one thousand dollars; or, if such bondholders so elect, to contribute three per cent. of the par value of the bonds so deposited toward the payment of the debts of the Railroad Company, for which contribution no obligation of the Railroad Company will be issued to them. The collateral trust bonds above referred to shall be in such form and substance as shall be satisfactory to the Committee. The subscribing income bondholders shall declare their election at such time as the Committee shall hereafter fix, and shall make the needful payments as and when they are called upon to do so by the Committee; and for the purpose of securing such payments the said income bonds so deposited are hereby expressly pledged to and with the Committee herein named. Notice of the time and manner of declaring such election and of making such payments shall be given by publication thereof in one or more newspapers published in the City of Philadelphia, in the City of New York and in the City of London, such notice to be published twice a week during the said period of four weeks.

FOURTH.—Subscribing stockholders hereby agree to deposit their shares of stock endorsed for transfer in blank with the agents of the Committee, and at the time of such deposit either to agree to contribute five dollars per share of the said stock for the purchase of collateral trust bonds at par (interest to be adjusted), or of the scrip exchangeable for the same in blocks of not less than a thousand dollars; or, if such stockholders so elect, to contribute one dollar and a half per share toward the payment of the debts of the Railroad Company, for which contribution no obligation of the Railroad Company will be issued to them. Subscribing stockholders shall declare their election at such time as the Committee shall hereafter fix, and shall make the needful payments as and when they are called upon to do so by the Committee; and for the purpose of securing such payments, the said shares of stock so deposited are hereby expressly pledged to and with the Committee herein named. Notice of the time and manner of declaring such election, and of making such payments, shall be given by publication thereof in one or more newspapers published in the City of Philadelphia, in the City of New York and in the City of London, such notice to be published twice a week during the said period of four weeks. In case the plan shall be declared by the Committee to be effective, the stock certificates so deposited shall be assigned by the Committee to a Trustee, who shall become the registered owner of such stock, and the stockholders agree to accept in lieu thereof a certificate of such Trustee of equitable interest in such stock of the Philadelphia and Reading Railroad Company as they may have respectively deposited, to be known as assented stock trust certificates, and at the time of such transfer and registration of the said stock to the Trustee, as aforesaid, the Committee shall arrange or agree with the said Trustee that it shall vote upon the stock so transferred to it at each and every meeting of the stockholders of the Philadelphia and Reading Railroad Company, held for the purpose of electing a President and Board of Managers, or either, as is hereinafter provided.

At all meetings for the election of managers or officers of the Railroad Company held prior to the payment and cancellation by the Railroad Company of the coupons and registered interest purchased as herein provided, the Committee shall provide by such agreements as they may be advised to be necessary for that purpose, that such Trustee shall vote upon the stock so transferred to it for half of the Board of Managers and the President of the said Railroad Company, as it may be directed by resolution of the meeting of the general mortgage bondholders and for the other half of the Board of Managers as it may be directed by resolution of the meeting of the holders of assented trust stock certificates held as hereinafter provided, and a certified copy of the resolution requesting the Trustee to vote at stockholders' meetings for the persons named in such resolutions shall be full and sufficient authority to the Trustee Company casting such vote.

After all the coupons and interest purchased by the Committee have been paid and canceled by the Railroad Company, the Trustee Company shall vote until the maturity and payment of the general mortgage bonds and the discharge of the mortgage securing the same, as respects one-third of the Board of Managers, for such persons as they may be requested to vote for in a resolution passed at a meeting of the general mortgage bondholders in the manner hereinafter provided; as respects one-third of the Board of Managers, for such persons as they may be requested to vote for in a resolution to be passed by the income bondholders, held in the manner hereinafter provided; and as respects one-third of the Board of Managers and the President in such manner as they may be requested to vote for at a meeting of the holders of the assented stock trust certificates, to be held in the manner hereinafter provided.

FIFTH.—The Committee shall provide by such proper agreement with the Railroad Company as they may be advised to be necessary for that purpose, that the Railroad Company shall, at its own expense, keep three sets of transfer books or ledgers, to be called voting

registers, namely the voting register of the general mortgage bonds, the voting register of the income bonds, and the voting register of the assented stock trust certificates, respectively. Any holder of any of the three mentioned classes of security shall be entitled to have his name and address and the denomination and number of the respective securities held by him entered in the voting register to be kept for the respective classes of such securities, on presenting at the office or agency of the Railroad Company aforesaid a written statement of the aforesaid particulars, signed by him, and the production of the bonds or assented trust stock certificates, or upon filing with the Railroad Company a written order of the person last registered as the holder of such securities, or in such other manner as may be prescribed after the approval of the Committee herein named.

The Committee shall further provide by agreement with the Railroad Company that it shall call an annual meeting of such of the holders of the said three classes of securities as may have entered their names in the voting registers, at such convenient place in the City of Philadelphia as shall be designated by the Company, by at least four weeks' public notice, to be published in one or more newpapers published in the City of Philadelphia, in the City of New York and in the City of London, such notice to be published twice a week during the said period of four weeks, and the date designated for such meetings shall be not less than ten days preceding the annual meeting of the stockholders of said Railroad Company. At such meeting each general mortgage bondholder, whose name appears upon the general mortgage bondholders' voting register, shall be entitled to cast one vote in person or by proxy for each bond of one thousand dollars of principal money held by him, and each income bond bondholder, whose name appears upon the income bondholders' voting register, shall be entitled to cast one vote for each bond of one thousand dollars of principal money held by him, and each holder of assented stock trust certificates shall be entitled to cast one vote for each fifty dollars of principal money

expressed in the certificate held by him. The Committee shall also provide that the said Railroad Company may prescribe reasonable rules and regulations, conforming as nearly as may be to the regulations in force at the meetings of stockholders of the said Railroad Company, for the organization of said meetings and for the preservation of order at such meetings and determining the result thereof. The said Trustee Company and its assignees or successors in the trust shall, as the holders and registered owners of said stock, vote in person or by proxy at all stockholders' meetings of such Railroad Company until such time as all the coupons and interest purchased under this plan shall be paid and cancelled by the Railroad Company, as instructed and directed by resolution passed by a majority of votes cast at the annual meeting of the general mortgage bondholders for one half of the Managers of the Company and for a President of the Company, and shall vote for the other half of the Board of Managers as instructed by a majority of the votes cast at the annual meeting of the assented stock certificate holders. After said coupons and interest purchased under this plan shall have been so paid, and until the maturity and payment of the general mortgage bonds and the discharge of the mortgage securing the same, said Trustee shall vote in person or by proxy at all stockholders' meetings as respects one-third of the Board of Managers, as instructed and directed by a majority of the votes cast at such annual meeting of the said general mortgage bondholders; as respects one third of such Board of Managers, as instructed and directed by a majority of the votes cast at such annual meeting of said income bondholders, and as respects one-third of the Board of Managers and the President of the Company, as instructed and directed by a majority of the votes cast at such annual meeting of the holders of assented stock trust certificates.

For the purpose of identifying and registering the names of the general mortgage bondholders, income bondholders and holders of the assented stock trust certificates entitled to vote at such meetings, the voting registers for such general mortgage bonds, income bonds and assented stock

trust certificates may and shall be closed at the same time and for the same period at and for which the stock transfer books of the said Railroad Company shall, pursuant to its by-laws, be closed; and a copy of a resolution passed at each of the three meetings, certified by the presiding officer and secretary thereof, shall be full and conclusive evidence to the Trustee Company of the instruction under which they are to vote at the stockholders' meeting.

The Railroad Company shall not summon in the manner herein provided any meeting of the income bondholders, whose names may appear upon the voting register until after such time as the purchased coupons and interest shall have been paid.

SIXTH.— In the absence of such instructions as are hereinbefore provided for, or in case of indefiniteness of any such instructions, the Trustee Company shall vote at all such meetings, at its own discretion.

SEVENTH.—In case this agreement shall not be declared by the Committee to be effective, and foreclosure proceedings are instituted under the bondholders' agreement of May 7, 1894, the Committee will, in the event of any reorganization of the Railway Company conducted by them after foreclosure sale, recognize in such reorganization the Income Bondholders and Stockholders who have become parties to this agreement, or will, at the option of the Committee, return to them their securities with the amounts paid thereon.

EIGHTH.—All copies of this agreement which shall be subscribed by any of the holders of the general mortgage bonds, income bonds or stock and delivered to said Committee shall have like effect as if their signatures were hereunto subscribed, and the deposit of securities by the holders thereof with the said Committee or its agents, and the receipt of certificates therefor, shall constitute the depositors parties hereto, with like effect as if they had signed this agreement. Every general mortgage bondholder assenting to this plan by signature thereof, or de-

posit of his bonds thereunder, shall be deemed to have also assented to the bondholders' agreement of May 7, 1894.

NINTH.—It is expressly provided and agreed that the enumeration of specific powers herein shall not be construed to limit the general powers conferred by this agreement upon the Committee, and that this agreement shall extend to and be obligatory upon the respective executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, and set opposite thereto our addresses and the amounts of bonds held by us respectively this 1st day of October, 1894.

(Copy.)

THE PHILADELPHIA & READING RAILROAD COMPANY.

GENERAL OFFICE, READING TERMINAL.

PHILADELPHIA, September 19, 1894.

F. P. OLCOTT, Esq.,
Chairman.

DEAR SIR:

In compliance with your request for information as to the earnings of the securities in the Collateral Trust, we beg to inclose herewith a statement for the years 1891, 1892, and 1893, showing the actual earnings as reported by the Companies whose securities are included in the Trust, and also the amount received by The Philadelphia & Reading Railroad Company as owner of the securities.

Please note that certain of the Companies retained part of their earnings for betterments and working capital. This was especially true of the Reading Iron Company; but there would have been available for the payment of interest upon the Collateral Trust bonds in 1892 the sum of $556,085.50, and in 1893 the sum of $538,020.91, provided we had received the money applicable to a dividend on the shares of the Atlantic City Railroad Company, which was not declared, as there was no special object in doing so. So far as can now be estimated, the available earnings for 1894 will be about the same as they were in 1892 and 1893. The falling off of total earnings from 1891 was largely due to the depression in the iron trade, which peculiarly affected the Reading Iron Company and the Catasauqua & Fogelsville Railroad Company, both of which are now showing improving returns.

Very respectfully,

J. S. HARRIS,
President and Receiver.

THE PHILADELPHIA & READING RAILROAD COMPANY.

STATEMENT OF COLLATERALS PLEDGED IN COLLATERAL TRUST LOAN, AND EARNINGS THEREOF IN 1891, 1892 AND 1893.

	Par Value.		1891. Total Earnings.	1891. Amt. Recd. by P. & R. R. R. Co.	1892. Total Earnings.	1892. Amt. Recd. by P. & R. R. R. Co.	1893. Total Earnings.	1893. Amt. Recd. by P. & R. R. R. Co.
* Allentown R. R. Co.	$1,073,950	Stock.						
x Atlantic City R. R. Co	952,300	Pfd	$28,624 34		$74,583 00		$79,328 93	
	1,198,600	Com.						
x Camden County R. R. Co.	51,950	Stock.						
x Catasauqua & Fogelsville R. R. Co.	253,375	"	52,767 38	$25,337 50	27,871 00	$25,337 50	10,355 41	$7,601 25
* Catawissa R. R. Co.	11,400	1st pfd	1,788 85	1,788 85	1,748 50	1,748 50	1,725 83	1,725 83
	15,500	2nd pfd.						
* Central Dock & Terminal Ry. Co.	181,600	Stock.						
x Chester & Del. River R. R. Co.	37,500	Stock.						
* Colebrookdale R. R. Co	280,050	"						
x Del. River Ferry Co.	499,200	"						
* East Mahanoy R. R. Co.	282,300	"	16,938 00	16,938 00	16,938 00	16,938 00	16,373 40	16,373 40
* East Penna. R. R. Co.	877,750	"	52,665 00	52,665 00	52,665 00	52,665 00	52,665 00	52,665 00
x Gettysburg & Harrisburg Ry. Co.	540,350	"						
L Junction R. R. Co	85,900	"	34,360 00	34,360 00	30,065 00	30,065 00	25,770 00	25,770 00
x Locust Gap Improvement Co.	20,000	"	2,000 00	2,000 00	2,000 00	2,000 00	2,000 00	2,000 00
x Middletown & Hummelstown R. R. Co.	173,650	"						
* Mine Hill & Sch. Haven R. R. Co.	81,000	"	6,075 00	6,075 00	6,075 00	6,075 00	6,075 00	6,075 00
* Mill Creek & Mine Hill Nav. & R. R. Co.	47,975	"	4,797 50	4,797 50	4,797 50	4,797 50	4,797 50	4,797 50
* Mt. Carbon & Pt. Carbon R. R. Co.	38,400	"	4,608 00	4,608 00	4,608 00	4,608 00	4,416 00	4,416 00
x Morristown Jct. R. R. Co	20,000	"						
* North East Penna. R. R. Co.	312,600	"						
* North Penna. R. R. Co.	128,800	"	10,304 00	10,304 00	10,304 00	10,304 00	10,304 00	10,304 00
x Phila. Rdg. & Potts. Teleg. Co.	18,450	"	21,280 06	2,767 50	16,107 21	2,767 50	28,832 54	2,767 50
	200,000	Bonds		12,000 00		12,000 00		12,000 00
x Phila. & Chester Valley R. R. Co.	452,700	Com. Stock.						
	205,100	Pfd. Stock.						
	25,000	Bonds pfd.	1,250 00	1,250 00	1,250 00	1,250 00	1,250 00	1,250 00
	47,000	Bonds not pfd	1,880 00	1,880 00	1,880 00	1,880 00	1,880 00	1,880 00
* Phila. & Hsbg. & Pttsbg. R. R. Co.	1,982,300	Stock	99,115 00	99,115 00	99,115 00	99,115 00	99,115 00	99,115 00
* Pickering Valley R. R. Co.	61,000	"						
x Reading & Columbia R. R. Co.	786,300	"						
	9,500	Bonds 1st	475 00	475 00	475 00	475 00	475 00	475 00
	35,000	" 2nd	1,750 00	1,750 00	1,750 00	1,750 00	1,750 00	1,750 00
	1,000,000	Debentures.						
x Reading Iron Co.	998,000	Stock	459,068 30	28,500 00	206,144 00	59,880 00	168,000 00	59,880 00
x Rupert & Bloomsburg R. R. Co.	48,000	"						
* Schuylkill & Leigh R. R. Co.	47,250	"						
	93,900	Bonds	4,225 50	4,225 50	4,225 50	4,225 50	4,225 50	4,225 50
* Sch. Valley Nav. & R. R. Co	61,900	Stock	3,095 00	3,095 00	3,095 00	3,095 00	3,095 00	3,095 00
* Sham. Sunb. & Lewisburg R. R. Co.	1,995,850	"	119,751 00	119,751 00	119,751 00	119,751 00	119,751 00	119,751 00
x Locust Dale Coal Co.	156,000	Bonds	10,920 00	10,920 00	10,920 00	10,920 00	10,920 00	10,920 00
x People's Railway Co.	36,000		1,800 00	1,800 00	1,800 00	1,800 00	1,800 00	1,800 00
x Perkiomen R. R. Co	161,100	"	8,055 00	8,055 00	8,055 00	8,055 00	8,055 00	8,055 00
	$15,584,500		$947,592 93	$454,457 85	$706,222 71	$481,502 50	$662,960 11	$458,691 98

(*) Leased to P. & R. R. R. Co. (x) Controlled by P. & R. R. R. Co. (L) Owned jointly with Penna. R. R. Co.

FOURTH.—To deal with the holders of the Philadelphia, Reading and New England bonds and the holders of other imperfectly secured or disputed claims, the amount of which, aggregating about $1,200,000, is not included in the statement of floating debt, upon any terms which will not, unjustly prejudice the rights of other bondholders, as guaranteed by the mortgages, or in case of their unwillingness to accept the terms of the settlement which the Committee are willing to offer, and which the prior obligations of the Company to the bondholders permit it to offer, to allow their claims to remain as they now are.

FIFTH.—The Committee propose to agree with the Receivers and the Company to purchase general mortgage coupons and registered interest for five years, including the coupons and interest now in default, upon all bonds assenting to the agreement of May 7, 1894, in case the Company shall be unable to meet the same in any year from their earnings. That contract will expressly reserve to the Committee the right of foreclosure in case of any future default. The Committee will cause to be issued ten year general mortgage equitable interest certificates, secured by such purchased coupons or registered interest, to be retired out of the surplus earnings of the Company at 105 and accrued interest. All bondholders assenting to the agreement of May 7, 1894, and depositing their bonds under the readjustment agreement, will be given the right to take such scrip at par for their coupons.

The condition of the Company will then be as follows:

The Receivers' certificates and the floating debt will have been paid; the principal of the car trusts will have been reduced by $2,000,000, and the annual payments on the balance materially reduced. The Company will be in receipt of 1,860 general mortgage bonds, and will have in its treasury about $5,000,000, third preferred income bonds, and about $3,000,000 of other assets. On the first of January, 1898, it will also receive $10,363,000 additional general mortgage bonds, under the terms of the mortgage securing the same. During the next three years also, so much of the earnings of the Company as will be applicable to the payment of interest upon the general mortgage bonds will be freed by the purchase of the coupons on those bonds by the Committee and be applicable to other purposes, in case of absolute necessity. The annual payment of the Company will be materially reduced by the reduction of car trusts and the payments of the floating debt; and unless the earnings are less than last year, they will suffice to pay the interest upon the general mortgage bonds, together with the reduced car trust payments and leave a surplus. If, on the other hand, they reach the average of the last three or five years, such surplus will be large; and it is to be remembered that during the last five years the Company has distributed among the income bondholders over $8,500,000.

The Committee consider that this readjustment of the affairs of the Company will place it in a sound position, and that the junior security holders should be given the opportunity to further that result before the general mortgage bondholders resort to foreclosure. For the sake of protecting their own interests, and in consideration of the purchase of the general mortgage coupons by the Committee, it is expected that they will avail themselves of that opportunity. The offer cannot, however, be held open indefinitely.

INCOME BONDHOLDERS are, therefore, notified, within sixty days from the date hereof, to signify their assent to this plan to the Central Trust Company of New York, the Finance Company of Pennsylvania or the London County Bank of London by signing the readjustment agreement on file with those companies, and by depositing

with them their respective securities, for which temporary receipts, and, in due course, permanent engraved, negotiable, certificates, to be listed on the New York Stock Exchange, will be given. Upon the completion of the plan and of the purchase of the collateral trust bonds, the income bonds will be returned to the respective holders, in exchange for such certificates.

GENERAL MORTGAGE BONDHOLDERS who have not already signed the agreement, are requested to do so at the office of one of the agents of the Committee, the Central Trust Company of New York, the Finance Company of Pennsylvania or the London County Bank of London, at once, and all general mortgage bondholders are notified to deposit their bonds at one or the other of said agents under the readjustment agreement and to receive the cash for the coupons already in default together with accrued interest thereon, or general mortgage equitable interest certificates, as they may elect. If, at the expiration of the period of sixty days, these proposals have been accepted by a sufficient number of security holders to make the proposed readjustment, in the judgment of the Committee, effective, the Committee will abandon any steps already taken looking to the institution of foreclosure proceedings. If, at the expiration of that period, a sufficient number of security holders, in the judgment of the Committee, to make the plan effective, have not so deposited their securities and signified their assent to the plan, by the signature of the readjustment agreement, then the Committee will press such foreclosure proceedings to a final conclusion as rapidly as possible.

SIXTH.—In the event of the institution of foreclosure proceedings, the Committee will recognize such income bondholders and stockholders as may have signified their intention to accept the plan, in any reorganization of the property conducted by them after the foreclosure sale, and will also recognize such holders of deferred income bonds as may pay a cash contribution of $7.50 per Bond to the Committee within the period of sixty days or any extension thereof above provided for, or at the option of the Committee return the money paid.

Sept. 19, 1894.

FREDERIC P. OLCOTT, *Chairman*,
ADRIAN ISELIN, JR.,
J. KENNEDY TOD,
HENRY BUDGE,
THOMAS DENNY,
GEORGE H. EARLE, JR.,
SIDNEY F. TYLER,
SAMUEL R. SHIPLEY,
RICHARD Y. COOK,
} *Committee.*

FREDERICK W. WHITRIDGE,
JOHN G. JOHNSON,
MAYER SULZBERGER,
GEORGE L. RIVES,
Counsel.

J. N. WALLACE, *Secretary*,
54 Wall Street, New York.

Exhibit Y.

TO THE GENERAL MORTGAGE BONDHOLDERS AND JUNIOR SECURITY AND STOCKHOLDERS, OF THE PHILADELPHIA AND READING RAILROAD COMPANY:

The present financial condition of your property,* as stated to us by the Receivers, is briefly as follows:

The amount of Receivers' certificates is	$3,640,400 00	
and the interest thereon to the 31st of August is	36,424 00	
		$3,676,824 00
The amount of floating debt is	$3,843,000 00	
and the interest thereon to August 31st is about	57,645 00	
		3,900,645 00
		$7,577,469 00
The amount of car trusts now outstanding is		7,533,988 71

payable as follows:

	Equipt. Notes.	Car Trusts.	Total.
Three months to November 30, 1894	$315,984 20	$310,000 00	$625,984 20
Year ending " 30, 1895	1,607,586 12	460,000 00	2,067,586 12
" " " 30, 1896	1,051,045 32	652,000 00	1,703,045 32
" " " 30, 1897	1,033,545 32	430,000 00	1,463,545 32
" " " 30, 1898	796,605 87	310,000 00	1,106,605 87
" " " 30, 1899	257,221 88	310,000 00	567,221 88
	$5,061,988 71	$2,472,000 00	$7,533,988 71

The annual fixed charges, including interest on the general mortgage bonds and the Receivers' certificates and the floating debt, together with allowances for the maintenance of the railroad equipment and contingencies and sinking funds for the Coal and Iron Company (such allowances, and sinking funds, aggregating upwards of $1,000,000), but crediting the interest, dividends and rentals on properties owned, and excluding equipment payments, are $10,477,560 00

The net earnings of the Companies for the year ending November 30, 1891, were $10,977,398 80
For the year ending November 30, 1892 ..... 12,134,687 46
And for the year ending November 30, 1893 ..... 11,172,690 56

It is thus apparent that the Philadelphia and Reading Railroad Company has during the past three years earned the interest upon the general mortgage bonds, but the large car trust payments have made it impossible to pay the general mortgage interest during the Receivership. It is essential that the equipment payments should be continued, and the rolling stock thus protected. The available securities of the Company are mostly pledged

* (The figures given include the Coal Company.)

as collateral for the floating debt and the Company is without sufficient income or assets to pay the general mortgage interest.

The Committee propose to deal with the situation as follows:

FIRST.—In order to raise about $8,000,000 to pay off the principal and interest of the Receivers' certificates and the principal and interest of the secured floating debt, and also about $2,000,000 to pay off such equipment notes and car trusts as may not be extended, the income bondholders and the stockholders are required to contribute $10,000,000 in the following manner:

Each $10,000 of income bonds to subscribe for one $1,000 collateral trust five per cent. gold bond, at par and interest.

Each 200 shares of Philadelphia and Reading Railroad stock to subscribe for one $1,000 collateral trust five per cent. gold bond, at par and interest;

Scrip exchangeable in lots of one thousand dollars for the collateral trust bonds at par will be issued ratably to the holders of less than $10,000 of income bonds and 200 shares of stock.

Or the income bondholders and stockholders, may, if they prefer, pay, in cash three per cent. upon the par value of their holdings; that is to say thirty dollars per bond, or one dollar and a half per share: for which no obligation will be given. The bonds not taken by them will be purchased by a syndicate at seventy per cent. of their par value, less a guarantee commission of two and a half per cent. In case the readjustment does not become effective the contributions above referred to will be returned.

A full statement in respect to the collateral trust bonds above referred to will be found in the correspondence between the Receivers and the Committee, of this date.

SECOND.—The stockholders are to deposit their certificates of stock with the agents of the Committee, for ultimate transfer to the Central Trust Company of New York as Trustees, on such terms as the Committee's counsel may require, for the purpose of securing to the general mortgage bondholders the right, until the coupons purchased as hereinafter provided shall be paid by the Company, to direct how the stock shall be voted for one-half of the directors and the president of the Company, and thereafter to direct how the stock shall be voted as respects one-third of the directors, at the direction of the general mortgage bondholders; as respects one-third of the directors, at the direction of the income bondholders, and as respects one third of the directors and the president, at the direction of the stockholders.

THIRD.—The Reading Companies and the Receivers have agreed to apply so much as may be necessary of the proceeds of the sale of the collateral trust bonds to the payment of the Receivers' certificates, and of the secured floating debt, and the balance to payment on account of the car trust, in such manner as to secure an extension of the time of the payment on account of the remainder, so that the future annual payments in any one year shall not exceed $500,000, or such other sum as may be satisfactory to the Committee. As payments are made upon one of these car trusts, the Company will receive for its general purposes $1,860,000 general mortgage bonds now held as part security for such car trusts.

PHILADELPHIA AND READING RAILROAD COMPANY.

PHILADELPHIA AND READING COAL AND IRON COMPANY.

FOUR PER CENT. GENERAL MORTGAGE.

BONDHOLDERS' AGREEMENT.

FREDERIC P. OLCOTT, *Chairman*,
ADRIAN ISELIN, JR.,
J. KENNEDY TOD,
HENRY BUDGE,
THOMAS DENNY,
GEORGE H. EARLE, JR.,
SIDNEY F. TYLER,
SAMUEL R. SHIPLEY,
} *Committee.*

FREDERICK W. WHITRIDGE,
MAYER SULZBERGER,
Counsel.

George L. Rives
John G. Johnson

J. N. WALLACE, *Secretary*,
54 Wall Street, New York.

The Evening Post Job Printing House, New York.

Exhibit I.

PHILADELPHIA AND READING RAILROAD COMPANY.

PHILADELPHIA AND READING COAL AND IRON COMPANY.

FOUR PER CENT. GENERAL MORTGAGE BONDHOLDERS' AGREEMENT.

Default having been made by the Philadelphia and Reading Railroad Company in the payment of the interest which became due July 1, 1893, on the bonds secured by the general mortgage or deed of trust dated January 3, 1888, executed by said Railroad Company and by the Philadelphia and Reading Coal and Iron Company to the Pennsylvania Company for Insurances on Lives and Granting Annuities.

Now, therefore, we, the undersigned, holders of said general mortgage bonds to the amounts set opposite to our names respectively hereunto subscribed, in consideration of the advantages which will result to us respectively from concert of action in enforcing the lien of said general mortgage for the purpose of the collection of the interest due upon all of said general mortgage bonds, and, if need be, the payment of the principal of said general mortgage bonds, and of other good causes and considerations, do hereby, each for himself, and not the one for the others, or any of the others, agree with each other and with the Committee hereinafter named, as follows:

FIRST.—That we will act together and in concert in the endeavor to enforce the security afforded by said general mortgage for the collection of all interest due and to become due upon said general mortgage bonds, and, if need be, for the payment of the principal of the same held by us respectively. Whatever may be done under this agreement shall, subject to the stipulations herein contained, be for our equal benefit, according to the amount of said bonds now held or hereafter to be acquired by us respectively.

SECOND.—That Frederick P. Olcott, Adrian Iselin, Jr., J. Kennedy Tod, Henry Budge, Thomas Denny, George H. Earle, Jr., Sidney F. Tyler and Samuel R. Shipley are hereby appointed a Committee in our behalf for the purposes and with the powers hereinafter set forth. Said Committee may, from time to time, add to its numbers to any extent deemed advisable by a majority of the members thereof. In case a vacancy shall at any time occur in said Committee by death, resignation, or otherwise, such vacancy may be filled by a majority of the other members of the Committee, and such successors or additional members shall have all the power and authority under this agreement that they would have had if they had been named herein as original members of said Committee. Said Committee is hereby authorized and empowered, as our attorneys and in our names or otherwise, to take such proceedings, give such directions, execute such papers, and do such acts under said general mortgage or deed of trust or otherwise, as said Committee may consider judicious in order to enforce said security and the payment of the interest upon said bonds, and, in the discretion of the Committee, of the principal of said bonds held by us respectively, or so much thereof as may be collectible, and especially and without prejudice to the general authority hereinbefore given, to institute or cause to be instituted inquiries into the management of the mortgaged property, and the use and application of the income thereof, and into the management and financial operations of the mortgagor companies, and in the event of any mis-

management, misconduct or misapplication in connection therewith, to the injury of the security afforded by said general mortgage or to our rights as holders of said general mortgage bonds, to take or cause to be taken all such action to compel restitution or otherwise in respect thereto as the Committee may be advised; to demand payment of the interest of said general mortgage bonds; to declare due and payable the principal thereof, and to demand payment of the principal of said bonds; to annul any such declaration or demand, and waive and suspend any default under said general mortgage; to request and direct the trustee under said general mortgage to exercise any of the rights and powers hereby conferred, or to waive or suspend the exercise of any such right or power; to remove trustees and appoint successors, and to institute proper proceedings for such removal and appointment; to institute or cause to be instituted actions at law or in equity, including suits for the foreclosure of the general mortgage, to attend all bondholders' meetings and to vote in our names and on our bonds on all questions that may arise at such meetings under the provisions of the said general mortgage or otherwise; to possess and exercise each and every right, power and privilege conferred by said general mortgage bonds and said general mortgage upon the holders of said bonds, and otherwise to represent us in respect thereof, as fully as we could personally act.

Said Committee is hereby further authorized and empowered to appoint such sub-committees, counsel, attorneys, agents, experts or other employees as it shall see fit, and to pay them reasonable compensation for their services and to incur such expenses as shall, in their opinion, be necessary in carrying this agreement into effect. And we hereby give and grant unto said Committee full power and authority to do and perform every act and thing necessary and requisite to be done in and about the premises as fully to all intents and purposes as we might do if personally present, hereby ratifying and confirming all that said Committee shall lawfully do or cause to be done by virtue of these presents.

THIRD.—That in case of a sale of the mortgaged premises under said general mortgage, said Committee shall be and hereby is authorized and empowered to purchase the same for our account and benefit, according to the amount of said general mortgage bonds held by us respectively, at such price as said Committee may consider expedient (not, however, exceeding the aggregate amount of the principal and interest at the time being due and unpaid upon all the bonds secured by the general mortgage, together with all expenses connected with the enforcement of the provisions of said mortgage or deed of trust), and for such purpose to incur such expenses of foreclosure as said Committee may consider judicious, to use said bonds and coupons held by us respectively for the purpose of paying for the mortgaged premises, and to make any arrangement that may be proper to accomplish such a purpose that shall not involve the compulsory assessment of the subscribing bondholders.

FOURTH.—That for the purpose of enabling said Committee to carry out the general plan of this agreement the bonds held by us respectively and the coupons thereunto belonging shall, within thirty days after written request from the said Committee, mailed to our respective post office addresses as appended to our signatures hereto, be deposited by us respectively in the Central Trust Company of New York, or with its agents in London, to be held by it, under the control of said Committee, for the purpose of enabling said Committee to carry into effect the purposes of this agreement. At the time of such deposit transferable certificates for such bonds with coupons from July 1st, 1893, showing our right and title thereto, and the fact that they are deposited subject to this agreement shall be delivered to us respectively. One such certificate shall be given for each of said bonds or for any number of such bonds deposited by us as we may respectively require, such certificates to be so engraved and to be in such form as to comply with the requirements of the New York Stock Exchange in that behalf, but the Committee may provide for

the appointment of agents in London for the convenience of foreign bondholders in making deposits hereunder, under such conditions as may to them seem advisable, and as to deposits made in London the Committee may provide and deliver such certificates of deposit as they may deem best adapted to the conditions of the case; such last mentioned certificates need not necessarily conform to the rules of the New York Stock Exchange. By the acceptance of certificates of deposit as herein provided the several parties receiving the same and depositing their bonds with the Trust Company or its agents become parties to this agreement with the same force and effect as if they had severally affixed their signatures and seals to this instrument.

FIFTH.—If said Committee shall purchase the mortgaged premises, as hereinbefore authorized, the same may be conveyed to it, or to such persons as such Committee may designate, as it may be advised may be lawful, and such purchasers may take possession of the same for the account and benefit of ourselves respectively, or of our respective representatives and assigns, according to the amount of such bonds then held by us or them respectively. In the event of such purchase of the mortgaged premises, the said Committee shall immediately thereafter call a general meeting of the subscribers hereto, their representatives and assigns, and shall submit to such meeting a plan of reorganization of the property. If such or other plan of reorganization be approved at any such meeting by a majority of two-thirds in interest of such of us or them as shall attend such meeting, or be represented at the same by proxy, the plan so adopted shall be binding upon all the subscribers hereto, their representatives or assigns.

SIXTH.—If at any time before the sale of the mortgaged premises the Committee should deem it expedient to prepare a plan of reorganization, either with or without foreclosure and sale, the Committee may, in that event, call a meeting of the subscribers hereto, their representatives or assigns, for the purpose of acting on such plan. If such a

plan of reorganization shall at any time be prepared by any other person or persons, the Committee is authorized to consider the same, and, at its option, to call a meeting of the subscribers hereto for the purpose of acting thereon; and if any plan of reorganization be approved at any such meeting by a majority of two-thirds in interest of such of us or them as shall attend such meeting or be represented at the same by proxy, the plan so adopted shall be binding on all the subscribers hereto, their representatives and assigns.

In the preparation of any plan of reorganization either with or without foreclosure, and whether before or after a sale, the Committee may negotiate with other creditors of said mortgagor companies, secured and unsecured, and with the stockholders thereof.

SEVENTH.—If at any time opportunity should arise for making a settlement of the claims of the bondholders under the interest coupons now in default or which may hereafter be in default, upon terms which said Committee may consider advisable, said Committee is hereby authorized to make such arrangement or settlement in our names and on our account without calling a meeting of the bondholders, their representatives or assigns, provided, however, that the Committee shall not be authorized to make any settlement by the terms of which the interest coupons in default are not to be paid in cash.

EIGHTH.—That for the purpose of meeting the expenses of said Committee and carrying into effect the provisions of this agreement, said Committee is authorized to borrow not more than one-half of one per cent. of the par value of said general mortgage bonds, upon the pledge of each bond which may be deposited with it; and at the settlement under any mortgage sale of the mortgaged premises to be made between the Committee and the subscribers, their representatives and assigns, or upon the earlier termination, for any reason, of this agreement, the amount so borrowed by said Committee, with such interest as said Committee

may have paid thereon, shall be paid by each of the parties interested according to the number of the bonds held and owned by him, or shall be deducted from the amount due and payable to him.

NINTH.—If, during the continuance of this agreement, any question in the judgment of the Committee not herein provided for should arise in relation to any matter growing out of the duties hereby devolved upon said Committee, or otherwise howsoever, in connection with the subject matter of this agreement, it shall also be determined by a vote of a majority of two-thirds in interest, present or represented at a general meeting of the parties in interest under this agreement, and such determination shall be binding as well upon said Committee as upon all of the subscribers hereto, and their representatives and assigns. And for the purpose of providing funds for the purchase of the mortgaged premises or other special expenses, the amount which said Committee may borrow upon the security of said bonds as provided in the eighth paragraph of this agreement, may be increased by a like vote at a general meeting of the subscribers, their representatives or assigns.

TENTH.—That every general meeting of the subscribing bondholders, and of their representatives or assigns, for any purposes incident to the provisions of this agreement, shall be called by the Chairman or by a majority of the members of said Committee. Notice of such meeting shall be given by advertisement by publication thereof at least twice in two or more daily newspapers published in the cities of New York, Philadelphia and London at least fifteen days before the date thereof. In the determination of any question arising at any such meeting, the votes of the majority in interest of such of the subscribers hereto, or their respective representatives or assigns, as shall attend such meeting or be present at the same by proxy, shall prevail, unless a greater vote is herein specifically required.

ELEVENTH.—When, in the judgment of the Committee, this agreement has been signed by the holders of said general mortgage bonds to a satisfactory amount, the Committee will make announcement thereof, and thereupon this agreement shall become effective; but no subscriber hereto shall be deemed to have any rights whatever under this agreement unless he shall deposit his bonds when and as required by said Committee.

TWELFTH.—Said Committee is not to be under any obligation, express or implied, to any bondholder who shall not subscribe this agreement, and, if so required, deposit his bonds; nor shall any bondholder not so signing and depositing his bonds have any rights or claims whatsoever under or by virtue of this agreement; but all of the benefits and advantages of the same shall be confined to the persons who are subscribers thereto, and who shall deposit their bonds with such Trust Company or its agents when required as herein provided.

The time within which holders of said bonds may sign this agreement shall terminate at such time as said Committee may decide; but said Committee may extend such time, in their discretion, and may permit any holder of said bonds, although such time has expired, to sign this agreement on the deposit of his bonds, and may, in that event, impose such terms on any such holder of said bonds as said Committee may determine. But no right in law or in equity, nor any privilege or interest of any sort or description, is conferred upon any holders of said bonds who shall sign this agreement after the termination of the time fixed by said Committee without the consent of said Committee so to do.

Said Committee, as individuals, may also sign this agreement as holders of said bonds, and shall be entitled to all the rights and benefits accruing to any other subscriber.

The present or future members of this Committee may be or become pecuniarily interested in any of the property or matters which are the subject of this agreement, or may become members of any syndicate formed in connection

therewith, or in connection with any plan of reorganization thereunder, and they shall be allowed reasonable compensation for their services, and all expenses and outlays incurred by the Committee in carrying out this agreement shall be a charge upon the bonds and upon the interests of the bondholders therein respectively, not, however, exceeding the amount hereinbefore provided for.

All copies of this agreement which shall be subscribed by any of the holders of said bonds and delivered to said Committee shall have the like effect as if their signatures were hereunto subscribed, and the deposit of bonds with said Trust Company or its agents and the receipt of certificates therefor shall constitute the depositors parties hereto with like effect as if they had signed this agreement.

The act of a majority of said Committee, at any meeting duly called, shall be considered the act of the Committee, but no member of the Committee shall be individually pecuniarily liable, nor liable for the acts of any other member, or for anything but his own willful misconduct.

The Committee is authorized to construe this agreement and its construction of the same shall be final.

The Committee shall not be bound to carry this agreement into effect by a purchase of the mortgaged property, but if the Committee should at any time consider it expedient, it may terminate this agreement and thereupon said bonds deposited hereunder shall, on the order of the Committee and the surrender of the certificates issued in respect thereof be withdrawn from such deposit and returned to the parties respectively having such certificates, upon payment of their respective proportion of the expenses of the Committee as hereinbefore provided for.

Said Committee shall, within one year after the organization of any new corporation formed to acquire the property covered by the general mortgage shall have been completed, or the reorganization of the existing company shall have been effected, file its accounts, in which shall be included the amount of its expenses and reasonable com-

pensation, with the board of directors of said new or reorganized corporation, and the same as filed shall be final, binding and conclusive upon all parties thereto.

THIRTEENTH.—It is expressly provided and agreed that the enumeration of specific powers herein shall not be construed to limit the general powers conferred by this agreement upon the Committee, and that this agreement shall extend to and be obligatory upon the respective executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, and set opposite thereto our addresses and the amounts of bonds held by us respectively this 7th day of May, 1894.

SUBSCRIBER.	ADDRESS.	AMOUNT OF BONDS.

Supreme Court of the United States.

In re

Petition of ISAAC L. RICE.

Petition of Hartshorne Committee for leave to join.

TO THE HONORABLE THE CHIEF-JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now Richard B. Hartshorne, Henry T. Carey and Jacob Scholle, a committee of the security holders of the Philadelphia and Reading Railroad Company, and show to this Honorable Court as follows:

1. That they are a committee appointed for the purpose of protecting the interests of the bond and stock holders of the Philadelphia and Reading Railroad Company, under and by virtue of an agreement a copy whereof is hereto annexed and marked "Exhibit A."

2. That as such committee they represent, in addition to certain general mortgage bonds of said company, over 2,500 of the income mortgage bonds ($2,500,000) of the three classes, and over 1,000 shares ($100,000) of the stock of said railroad company, the holders whereof have executed the above-mentioned agreement.

3. Your petitioners further show that they have read the petition of Isaac L. Rice, dated December 1, 1894, praying for a writ of prohibition and a writ of mandamus to the Circuit Court of the United States for the Eastern District of Pennsylvania, and that being thereto duly authorized they do hereby approve of

and endorse the said application and all the statements contained in said petition, and they further show that they did by their counsel appear before the said Circuit Court on the 15th day of October, 1894, and did join with said Rice in his objections on that day made to the action of the said Circuit Court in the premises, as in said petition set forth, and did also by their separate petition apply for the same relief as did said Rice in said petition by him filed for the setting aside of said decree.

4. And your petitioners further show that, by the action of the said Circuit Court in the premises, they and those whom they represent are aggrieved and injured in the manner as by said Rice in his said petition to this Honorable Court is more fully set out.

Wherefore, your petitioners hereby, for themselves and those whom they represent, pray that they may be joined with said Isaac L. Rice in said petition, and that to them and those whom they represent may be granted the same relief in every particular, as holders of income mortgage bonds and as holders of stock of said Philadelphia and Reading Railroad Company, as prayed for in said petition of Isaac L. Rice.

And your petitioners will ever pray.

Dated New York, December 1, 1894.

RICHARD B. HARTSHORNE, Chairman,
HENRY T. CAREY,
JACOB SCHOLLE,
} Committee.

NATHAN BIJUR,
Of Counsel.

STATE OF NEW YORK,
City and County of New York, } ss. :

RICHARD B. HARTSHORNE, being duly sworn, says that he is chairman of the above-named committee, petitioners; that he has read the foregoing petition, and that the same is true.

RICHARD B. HARTSHORNE.

Subscribed and sworn to before me this 1st day of December, 1894.

P. LEWIS ANDERSON,
Notary Public,
N. Y. Co.

Exhibit A.

We, the undersigned, hereby appoint Richard B. Hartshorne, Henry T. Carey and Jacob Scholle a Committee for the purpose of protecting our interests in the Philadelphia and Reading R. R. Co., with power to add to their number. We authorize and empower the said Committee to do whatever in their estimation may be necessary in the premises, including the bringing and conducting of legal proceedings. A majority of said committee shall have power to act. We agree to pay to said Committee a sum not exceeding one-fifth of one per cent. of the par value of the securities of the Philadelphia & Reading Railroad Co. held by us to the amount set opposite our respective names, other than the deferred income bonds, and as to those a sum not exceeding one-tenth of one per cent. of the par value of said bonds. That is to say, two dollars per thousand ($2 per $1,000) on all securities except the deferred income bonds, and one dollar per thousand ($1 per $1,000) on the deferred income bonds. Said amount or so much of it as shall be necessary shall be used for the expenses which may be incurred or authorized by said Committee in protecting our interests as such security holders by legal proceedings or otherwise, and the surplus, if any, shall be returned *pro rata*.

NAME.	ADDRESS.	CLASSES OF SECURITIES.	AMOUNT.

Check should be made payable and sent to any member of the Committee, as follows: Richard B. Hartshorne, 18 Wall Street; Henry T. Carey, 42 New Street, or Jacob Scholle, 33 Broad Street.

IN THE

Supreme Court of the United States.

Ex parte

ISAAC L. RICE,

Petitioner.

Brief in Behalf of Petitioner on Motion for Writ of Prohibition and Writ of Mandamus.

NATHAN BIJUR,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

In the Supreme Court of the United States.

Ex parte

ISAAC L. RICE,

Petitioner.

Brief in behalf of petitioner on motion for writ of prohibition and writ of mandamus.

Statement of Facts.

On the 25th day of September, 1894, the Receivers of the Philadelphia and Reading Railroad Company and of the Philadelphia and Reading Coal and Iron Company, appointed February 20th, 1893, and said railroad company itself, presented an unverified petition to the United States Circuit Court for the Eastern District of Pennsylvania for authority to enter into an agreement with a committee providing for an attempt to reorganize the financial affairs of said companies and for the payment by the Receivers of commissions, aggregating over $400,000, to said Reorganization Committee and a syndicate which the committee represents, provided the plan be declared effective by said committee acting in conjunction with the Board of Managers of the railroad company.

The committee does not appear as the owner of any part of the trust properties nor as representing any substantial or controlling interest in any class of its securities, although petitioner understands that several of its members are security holders of the company.

The committee appears in the petition and contract merely as a body desiring to undertake the rehabilitation of the company's finances.

The contract provides that in the event of its becoming effective, the railroad company will repay all expenses incurred in putting forth and advertising the plan. It is not stated who will pay such expenses in the event of the failure of the plan. The Receivers, however, last year, paid out of the trust fund the very large expense of promoting a previous plan which failed.

The present plan leaves large claims unadjusted and does not terminate the receivership, even when declared effective. It becomes effective when the committee and the board declare it to be so.

One of its provisions requires holders of the general mortgage bonds of the railroad company to deposit their bonds with another committee known as the Olcott Committee, and to sign an agreement prepared by the latter which provides for the foreclosure of the Reading properties.

The Olcott Committee has not heretofore been able to secure a sufficient number of bonds for that purpose. In the event of the failure of the plan the bonds deposited and signed for with the Olcott Committee are not to be returned to the owners.

Sufficient, viz., 10%, of the general mortgage bonds, it is announced by the reorganization committee, have since the decree complained of been deposited under the said plan and assented to the agreement of the Olcott Committee to empower the Olcott Committee to institute foreclosure proceedings, and it has been announced by the Finance Company of Pennsylvania, one of the agents of the reorganization committee, and by members of the committee, that this is sufficient to enable the plan of reorganization to succeed through foreclosure if not without it.

The plan further provides for giving to the Reorganization Committee an option upon nearly all the securities in the treasury of the railroad company, namely,

$10,000,000 of collateral trust bonds at 70% of their par value, the same bonds being offered to the income bondholders ($60,000,000) and the stockholders ($40,000,000) at par. For this the committee receives 2½% commission on the $10,000,000, and agrees to take the bonds at 70 if not (or so many as may not be) taken by the security holders at par; but the committee does not bind itself to do this unless the plan becomes operative, determination of which is confided to the committee and the Board of Managers. Moreover, under the readjustment agreement the committee has the right to extend the time during which security holders may deposit under and assent to the plan, so that the option is practically unlimited in time. The date fixed at present as the expiration of said deposit period is December 31st, 1894.

Ten per cent. (10%) of the outstanding general mortgage bonds (viz., 10% of about $44,000,000) have power to institute foreclosure proceedings under the mortgage. The plan does *not* provide that it shall not be effective unless over 90% of such general mortgage holders assent.

The contract also provides for the purchase by a syndicate of ten of the general mortgage coupons covering five years (of which three coupons are already in default) in the event that the company shall be "unable to pay the same." The company and the Receivers agreeing to redeem such purchased coupons at 105 and interest out of any annual surplus, and, absolutely, at the end of ten years from the date of their purchase, stipulating, however, that such inability to pay the coupons shall be determined only after "paying such charges as the Receivers now pay." The prospectus also states that this purchase will free the funds applicable to the payment of the general mortgage interest "for other purposes, in case of absolute necessity." The charges referred to are claimed by the petitioner to be in violation of his rights under the third income mortgage (the same provision is contained in the first and second in-

come mortgages also), limiting what charges may be paid before net earnings are made applicable to the payment of interest on his bonds. Recognized as payable under the mortgage are the operating expenses of the railroad and coal and iron company, including reasonable improvements to the mortgaged estate and the fixed and other charges as they existed January 1st, 1888. Charges incurred subsequently thereto are excluded from payment before payment of interest on said income bonds. Petitioner, a year ago, filed an intervening petition for the purpose, among others, of enjoining the payment of the charges now paid by the Receivers in violation of his mortgage, which petition has been referred to the Master, evidence taken, report made and exceptions filed, and the issues there raised set down for a hearing on December 4th, 1894.

The plan further provides for the creation of a voting trust, whereby the right of the stockholders to elect six managers and the president, under the charter of the company, is distributed among the general mortgage bondholders, the income bondholders, and the stockholders, under a system of registration of the bonds by and at the expense of the company, the "readjustment agreement" providing that, in the event of the failure of the bond and stock holders to designate their choice in the manner there provided, the Central Trust Company of New York may vote the proxy at will.

The election for the ensuing year will take place January 14th, 1895, and stockholders remaining of record since October 14th, 1894, are entitled to vote. Under the plan stockholders deposit their stock with the committee at once for the purpose of creating this voting trust.

Annexed to the petition of the Receivers is a copy of their proposed contract and a copy of the prospectus of the plan prepared by the committee. Three other instruments, however, are referred to in the moving papers, but are not annexed, viz.: The Olcott Commit-

tee's agreement of May 7th, 1894, the readjustment agreement of the Reorganization Committee of October 1st, 1894, and the agreement of the syndicate which the Reorganization Committee represents. Of the two former the agreement of May 7th, 1894, has been before the public since that date, the agreement of October 1st, 1894, has been made public since the entering of the decree complained of, and the syndicate agreement has neither been presented to the Court nor made public. To understand the force and meaning of the decree it is necessary to consider together the decree, the opinion of the Court as handed down therewith, the petition of the Receivers, the contract annexed thereto, the official prospectus of the committee, the readjustment agreement, and the Olcott Committee's bondholders agreement of May 7th, 1894. The syndicate agreement cannot be considered since it is kept from introduction in evidence or publicity.

Upon presentation of the petition of the Receivers on September 25th, 1894, the Court directed that advertisement be made in the newspapers of New York, Philadelphia and London of a hearing on October 15th, 1894, at which all parties in interest might appear and be heard. Petitioner appeared at said hearing by his counsel. Counsel for the Receivers opened the argument at 10 o'clock in the morning, and spoke for about three-quarters of an hour, urging the necessity of speedy action by the Court. Thereupon petitioner's counsel opened his argument in opposition, but after speaking a few minutes was informed by the Court that as jury trials had in the interval been set down to be conducted in that Court, and the jurors had assembled for that purpose, it was impossible to continue at the moment, and that in order to avoid delay counsel might proceed with their argument before the Special Master if they were satisfied to do so. The Master was to hand in the stenographic record of the arguments with his report. Petitioner's counsel asked the Court whether it would not first determine whether

it had any jurisdiction in the premises, and the Court remarked that this also could be argued before the Master. The proceedings before the Master were constantly interrupted by the various counsel present and even by members of the committee, individual Receivers, and others who happened to be present. The petitioner's counsel on ascertaining definitely that for this and other reasons the expert stenographer present had been unable to take down accurately or completely the arguments or points made by him (and before the Master had reached any conclusion or made any report) promptly addressed a communication to the Circuit Judge detailing these facts and asking for a hearing before himself.

Petitioner's counsel had both before the Court, in the few minutes in which he had spoken, and before the Master, objected to the insufficiency of the moving papers, and had clearly and fully raised the question of the want of jurisdiction of the Court in the premises generally. On October 23d the Master's report was filed with the incomplete stenographic record annexed. The report stated the Master's conclusions of law, and made numerous findings of fact, although absolutely no evidence had been introduced, and although some facts found had not even been averred in the petition, as, for instance, that no other plan of reorganization was then pending, and also statements of one of the Receivers, who was not a witness, nor called upon to testify, as to how other plans would be treated by the Receivers. The Master's report, or summary of the argument of petitioner's counsel, is incomplete, incorrect and confused with the arguments and contentions of other counsel, some of the contentions attributed to petitioner's counsel being unintelligible to himself.

It omits material statements made by counsel for the petitioner, as also his reservation of his right to reply to certain statements of counsel for the Receivers; which reply petitioners' counsel was under the impression would be made at the hearing which he ex-

pected would take place before the Court, either on exceptions to the Master's report, or otherwise, as well as upon the hearing of evidence in the case. The relator also omits an opinion of counsel for the Receivers, published in May, 1894, to the effect that foreclosure would be disastrous to the interests of all parties, both as to its legal and practical effects—which opinion petitioner's counsel asked the Master to annex—and said report is otherwise in many other material aspects inexact.

Petitioner's counsel at once undertook the preparation of exceptions. While these were being prepared counsel was surprised by the information, through the press, that a decree of the Court had been entered on October 29th, and an opinion handed down wherein his request for a hearing was denied.

On the 9th of November, counsel moved upon a verified petition and due notice, to vacate the decree, and for procedure upon the petition of the Receivers according to due course of law; or in the alterative that the decree be opened and leave be granted to plead *nunc pro tunc* according to the rules of law and for other and further relief, which petition the Court permitted to be filed, but denied the relief prayed for.

In the interval the committee began advertising for deposits and signatures under its plan setting out the authority of the Court to the Receivers to enter into the contract with it, and also advertised that it would cash the three defaulted coupons of the general mortgage bonds deposited under the said readjustment agreement, and signed to the Olcott committee's agreement, as the plan provided. By these means, in the course of some ten days the committee obtained a sufficient number of mortgage bonds (*i. e.*, ten per cent. of the issue, or about $4,400,000) to enable it to announce its ability to institute foreclosure proceedings unless a sufficient number of security holders deposited under or assented to the plan to warrant the committee in its judgment to declare the same effective.

The merits of the plan itself cannot be adjudicated in the present application, in fact, can scarcely be considered at all until a proper hearing be had thereon and opportunity be offered for examining and cross-examining witnesses. Petitioner, however, objects to the plan because it is based upon a statement of earnings which analysis by the petitioner and experts employed by him shows to be totally incorrect; because the plan fails to relieve the company of its indebtedness, leaves it in the hands of Receivers, and is therefore a mere half-way measure; because it leaves the company's treasury almost bare of assets, but with considerable liabilities outstanding, and, even if there were none such, the requirements of a property with an income and corresponding expense of about $50,000,000 per annum demand that there should be a substantial reserve in the treasury. This plan, even without the claims which it recognizes as still unadjusted, even after it has been declared effective, leaves in the treasury of the company, according to reliable information obtained by petitioner, available assets worth not more than $1,500,000. The $5,000,000 third preference income bonds which the prospectus refers to as being in the treasury, are the obligation of the company itself, and are part of the issue which was made without any consideration, and, as claimed by the petitioner, illegally and in fraud of his rights. To regard the obligation of the company as one of its assets is not considered by the petitioner sound or even serious financial judgment. Moreover, the petitioner believes that, instead of the chief creditors of the company, like the general mortgage bondholders, being asked to fund coupons and otherwise to disparage their obligation, sacrifices, if any are necessary, should be made first, and at least equally by junior and extraneous lienholders, whose charges under this plan are expressly established as prior in rank and dignity. Grave considerations as to the general control and management of the companies, upon which petitioner believes de-

pends the rehabilitation of the company upon a sound foundation, are left entirely untouched, and even unreferred to in the plan. This memorandum of some of his objections is made solely for the purpose of indicating that his opposition is neither captious or factious.

For other and more minute details of the plan counsel respectfully begs leave to refer to the petition herein and to the record in the suit wherein the Receivers were appointed, a resumé or abstract whereof is given in the petition.

POINTS.

I.

This Court has jurisdiction to issue a writ of prohibition and a writ of mandamus to the Circuit Courts of the United States under Sections 716 and 688 of the Revised Statutes, which read as follows:

"SEC. 688. The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime juridiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul is a party.

SEC. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs to *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

These writs are forms of the exercise of the appellate jurisdiction of this Court under the Constitution and the Judiciary Act.

Virginia vs. Rives (1879), 100 U. S., 313.

Mr. Justice FIELD in a separate opinion, at page 327, says, " That jurisdiction may, however, be called into exercise in various ways. The term " appellate " in the Constitution is not used in a restricted sense, but in the broadest sense as embracing the power to review and correct the proceedings of subordinate tribunals brought before it for examination in the modes provided by law. Congress has prescribed the mode or process by which such proceedings shall be brought before the Court. In equity cases it is by a simple notice that an appeal is taken from the decree or proceeding sought to be reviewed ; in common-law cases it is generally by writ of error ; in some cases it is by a writ of prohibition and in some by that of *certiorari* or of mandamus."

II.

This Court may issue writ of prohibition to the Circuit Courts. It practically issued such a writ in Bronson vs. Lacrosse R. R. Co. (1863), 1 Wallace, 405, and although no writ was issued, this Court recognized its right to issue the same in *Ex parte* Warmouth, 17 Wallace, 64, and in *In re* Baiz, 135 U. S., 403.

III.

This Court has appellate jurisdiction directly from the Circuit Courts in any case in which the jurisdiction of said Circuit Courts is in issue.

This Court had exclusive appellate jurisdiction directly from the Circuit Courts of the United States until the passage of the "Evarts Act" of March 3d, 1891. That act interposes an appeal to the Circuit Court of Appeals in certain cases, giving, however, this Court appellate jurisdiction in all cases (where it may deem it proper to exercise the same) by writ of *certiorari*, and expressly reserving to this Court appellate jurisdiction directly from the Circuit Courts in any case in which the jurisdiction of said Circuit Courts is in issue (Sec. 5 of the act).

IV.

This Court has sole jurisdiction to issue writs of mandamus directly to said Circuit Court.

The right to issue writs of mandamus is not given to the Circuit Court of Appeals, being conferred apparently exclusively upon this Court by Section 688 of the Revised Statutes. The Circuit Court of Appeals, under Section 12 of the act, has only such powers as to writs as are conferred by Section 716.

Moreover, the writ of mandamus can in this case be issued only by this Court, inasmuch as the Circuit Court of Appeals for the Third Circuit is not in session or term, its next term beginning only on the third Tuesday of March under the statute and its rules. The injury complained of by the petitioner may be entirely consummated by December 31, 1894, while grave harm results from day to day by virtue of the committee's announced power, acquired under the decree of the Court, and its consequent threats, to institute foreclosure proceedings unless its plan is adopted, to the damage of the value of petitioner's securities.

An analogy for the exercise of this right by this Court during the time when another tribunal which might issue the writ is not in term is to be found in the English practice, under which when the common law courts were not sitting, the Court of Chancery would grant writs of prohibition.

V.

While not perhaps essential, it is due to the dignity of, and respect for, the inferior Court that the question of jurisdiction should have been raised before it.

Havemeyer vs. Superior Court, 84 Cal., 327.

That issue was distinctly raised by petitioner's counsel before the Court orally, before the Master, in his letter or plea to the Court, and upon the motion for vacating the decree.

The applicant for a writ of prohibition need not even be formally a party of the record to the suit sought to be prohibited, inasmuch as the writ of prohibition is in the nature of relief in the public interest on behalf of the sovereign power of the State to restrain one of its agents, a Court, from usurping or exceeding jurisdiction, and any party in interest injured thereby may apply for relief by this writ.

See

Spelling on Extraordinary Remedies, Sec. 1745.

Havemeyer vs. Superior Court, *supra*.

The position of the petitioner Rice, therefore, as an intervening petitioner in the suit of Platt, whereunder the Receivers were appointed, and as having appeared upon the proceeding herein sought to be prohibited, as a creditor to a substantial amount (particularly where

the third preference income mortgage makes its essential provisions a covenant with each hoider), and as having protested in the court below against its assuming jurisdiction, more than complies with every requirement.

VI.

While a writ of prohibition when necessary for complete and adequate relief will lie contemporaneously with an appeal or with the right of appeal, it would seem, under such circumstances, to be a matter of discretion.

It will issue as of right, though not as of course, where an appeal does not lie and the petitioner has properly raised the question of jurisdiction at the outset Smith vs. Whitney, 116 U. S., 167 (1886), at page 173.

VII.

This appears to be a case in which there is doubt whether an appeal will lie from the decree, although it seeks to finally adjudicate *obiter*, and by way of contract, involving, perhaps, a species of estoppel, issues raised by the petitioner in another proceeding not yet determined and although it lends the authority of the Court to schemes which petitioner regards as injurious to his rights and which are being propogated under the sanction of the Court to his constant and daily damage.

It is not an interlocutory decree in the suit of Platt vs. The Philadelphia & Reading R. R. Co., &c., wherein the Receivers were appointed, inasmuch as

I. It involves matters altogether unrelated to the care and custody of the funds and properties in the hands of the Court. 2. In so far as it may be said to relate to such care and custody, it is not an absolute act and therefore not an administrative measure, but depends for its execution upon the will or opinion of strangers to the cause. 3. It will not come up for review upon the final decree of foreclosure and sale, yet it requires no further action by the Court itself.

Neither is it a final decree. It seems to determine no issues at all, finally or otherwise, although it affects substantial rights. It cannot be final, for it may not become effective or operative if certain parties, strangers to the cause, determine that it shall not be so.

VIII.

The writ of prohibition is applicable to this case. No court of the United States has power, authority or jurisdiction to promote or aid with its influence, or the funds or properties in its hands, what is known as a plan of reorganization, viz., a plan which changes existing contract rights and liens, and creates new ones affecting the rights and liens of the parties in interest.

A receivership is an extraordinary and a temporary measure instituted under the extraordinary powers of a court of equity for the protection of a fund or property against the attacks of creditors generally, in order to insure the preservation of such fund and its application intact to the payment primarily of the debt whereon suit is instituted, and generally for its equitable application to all the debts chargeable thereon when properly marshaled. In cases of corporations not *quasi* public, nor clearly affected with a public interest, the Receiver is charged with the duty of winding up the

concern ; in other cases it is necessary that he maintain the property "as a going concern" in view of the necessity of accomodating the public and preserving its rights in the maintenance of the indebted estate.

For the preservation of the estate to the above well-settled lawful purposes, Receivers have been permitted to maintain the properties out of the income, and to charge upon the estate, with such priority of lien as may be duly adjudicated, the expenses necessary for the maintenance of the property in the interest of all the creditors and of the public. This doctrine has been carried to its utmost limit in the issue of Receivers' certificates; but in such cases it has been carefully stated by this Court that existing contract rights and liens are not abrogated nor to be changed by the receivership.

Kneeland vs. American Loan & Trust Co.,
136 U. S., 89.

When the Court, therefore, assumes to make not merely a decree, but a contract with parties who are not the owners or controllers of the mortgaged estate, who do not even represent a controlling interest in any part, division or even class of securities, of the mortgaged estate, for the purpose of altering existing rights of creditors, parties in interest, and even parties to the suit—such attempt is beyond its jurisdiction either at law or equity.

In fact the law does not know a proceeding whose bare purpose is to alter an existing clear and acknowledged contract right. The petition of the Receivers in this case therefore presents *no subject matter* within the jurisdiction of the Circuit Court of the United States or any other Court; presents for action a matter that involves no issue cognizable at law or equity; asks for no relief, and surely for no relief known to or relating to the jurisdiction of the Court properly invoked in the suit of Platt vs. The Philadelphia & Reading R. R. Co., and does not ask to bring nor does it bring before the

Court those persons who are necessarily parties to the proceeding and who, even were it possible for the Court to make a tentative or conditional decree, must be heard before such experiment can be entered upon.

The petition of the Receivers is therefore beyond the jurisdiction of the Court not merely in its relation to the suit of Platt vs. The Philadelphia & Reading R. R. Co., but also because it fails to present any subject matter within the jurisdiction of the Court, prays for relief without the jurisdiction of the Court, and because there exists in the proceeding thereon a complete absence of parties necessary to give the Court initial jurisdiction.

The present action of the Circuit Court has no reference to the *res* in court as such, nor to the purposes of its possession by the Court. It deals with matters and attempts to pass on issues entirely extraneous. Possession of the *res* in court by no means carries with it jurisdiction over the subject matter of an action not related to the purposes of that possession. And want of jurisdiction over the subject matter cannot, like jurisdiction over the person, be waived. These distinctions are recognized by this Court in *Ex parte* Phœnix Ins. Co., 118 U. S., 610, 618 ; *Ex parte* Pennsylvania, 109 U. S., 174 ; *Ex parte* Gordon, 104 U. S., 515 ; *Ex parte* Hagar, 104 U. S., 520, and cases there cited. The same distinction is observed in *Ex parte* Plymouth, 3 Wallace, 20.

IX.

The writ of mandamus is particularly appropriate in cases where there is no other adequate remedy by appeal or otherwise, as where the matter is in the nature of a summary proceeding, *Ex parte* Bradley, 7 Wallace, 364, 377 (1868).

It will even lie against the arbitrary exercise of the discretion of the Court, *Ex parte* Secombe, 19 Howard, 13; or where the action of the inferior court is irregular or flagrantly improper, *Ex parte* Burr, 9 Wheaton, 530.

It may also be invoked like the writ of prohibition to restrain Courts from exceeding their jurisdiction.

Virginia vs. Rives, 100 U. S., 313, at p. 324, and cases and authorities there cited.

X.

The writ of mandamus is also applicable to compel proceedure in accordance with the established rules of practice in view of the summary manner in which the Court has acted:

1. In refusing a hearing before itself.

2. In determining *obiter* and collaterally vital issues.

3. In the absence of the necessary parties in interest who cannot be brought in by a mere newspaper advertisement.

4. In granting even an *ex parte* application of such great importance without an accounting of the affairs of the company complete and detailed, and without evidence as to the facts stated in an unverified petition.

5. Because the opinion of the Court states facts as to which there was not only no evidence, but even no averment; as, for instance, the non-existence of any other plan of reorganization.

6. Because it sets out that the Court neither approves nor disapproves the plan, although by its contract it not only approves the plan complained of, but through giving an exclusive option to the committee thereunder of the securities of the company, renders impossible the promotion of any other plan or of any plan by other parties.

7. Because the intimation of the Court in its opinion that it will dissolve the receivership unless some plan be speedily adopted, cotemporaneously with its approval of the plan complained of, constitutes a threat to the security holders of serious injury in case said plan be not adopted.

8. Because the Court, as custodian of the trust fund, cannot permit the fund to be diminished, or any substantial change therein to be authorized, without clearly deciding that the action involved is for the benefit of the trust fund. It cannot therefore permit the payment of over $400,000 in commissions out of the trust fund upon a transaction upon the merits of which it declines to pass, and which is not to be consummated except upon the wish and determination of strangers to the cause acting in conjunction with the debtor, thus delegating its functions and abandoning the rights and property of the petitioner to the will of strangers, over whom neither the Court nor this petitioner has any initial control.

XI.

The injury complained of by the petitioner through the decree or contract of the Court is irreparable:

1. The lending of the weight of its authority by the Court to a plan which petitioner regards as injurious, the promotion of such plan under the public sanction

of the Court, and the giving by the Court of an exclusive option upon the trust securities to its promoters, constitute an immediate injury which continues, and redress from which can not be had, nor the matter even be reviewed upon an appeal from the decree, either in the suit of Platt or in this proceeding. It is not merely that the position of the parties is being changed by reason of such promotion, but the injury of the plan may be consummated by the declaration of its effectiveness on December 31st, 1894.

2. The advertisements of the plan announcing the sanction of the Court thereto and the cashing of the coupons of assented bonds thereunder by the Olcott Committee has resulted in a deposit with that committee of a number of bonds sufficient to enable foreclosure proceedings to be instituted, while before such announcement and offer the committee was unable to secure deposits sufficient for that purpose; and this particularly for the reason that counsel for Receivers had previously declared publicly that foreclosure would be extremely inadvisable if not dangerous. Nevertheless, the threatening to foreclose on the part of said Olcott Committee may intimidate junior security holders to assent to the plan which otherwise they might reject, and constitutes, therefore, a continuing injury made possible by the action of the Court, which cannot come up for review upon an appeal; and if foreclosure be consummated or the plan be made effective by threats to foreclose, such appeal would be nugatory.

3. The sanction of the Court for, and the placing by it of, the securities of the company under control of the Reorganization Committee, while the latter uses this favored position to endeavor to force the acceptance of a voting trust, is an accomplished injury, and action which cannot come up for review upon appeal.

4. The payment of a large commission—over $400,-

000—out of the trust fund to the Reorganization Committee upon its declaration, in conjunction with the Board of Managers of the debtor company, that the plan is effective, and certainly the irregular manner in which such commission is authorized to be paid through abrogation by the Court of its function of deciding that its payment is necessary to and for the benefit of any trust fund, cannot be reviewed upon an appeal. But, even if it could,

5. Petitioner should certainly not be relegated to a remedy upon a final accounting—which may not take place for years—for the recovery of sums so enormous that no ordinary individual could respond in damages, particularly not in a case where the Receivers have given only their individual bond. It is not merely the $400,000 commissions, by which the trust fund will be depleted, but the recognition as proper charges,—in fact, the contract of the Court to pay "such charges as the Receivers are now paying" (and of which the petitioner elsewhere complains), which will in the course of a few years diminish the trust fund by millions more. It is for just such cases that the remedy of injunction is specially devised, and the writ of prohibition partakes largely of the character of an injunction by a superior against an inferior tribunal.

XII.

The application for authority, as made by the petition of Receivers, seems to be merely an attempt to gain for a reorganization committee as such, sufficient sanction or apparent sanction of a Court of high jurisdiction, to enable the committee to prosecute to a successful conclusion its enterprise of reorganization, as

much for its own profit as for the good of the trust fund. The contract of the Court gives the committee an exclusive option on the company's securities, and an official standing wherefrom to advocate its plan before the body of the security holders. It is enabled thereby to secure a sufficient number of general mortgage bonds to entitle it to threaten foreclosure proceedings, which number of bonds it had theretofore, notwithstanding its strenuous efforts, been unable to gather in. A belief on the part of any faction of the security holders, and certainly on the part of strangers, that a successful reorganization can be accomplished only under threat of foreclosure, is no reason for the intervention of the Court to enable such theories to be exploited. If the foregoing were not the moving considerations in the application through the Receivers, it might well be asked why any action of the Court was prayed for until the committee had assured itself of the assent of the security holders.

In cases where action of a Court has been invoked in any wise related to reorganization plans, it has been solely to dissolve the receivership and restore the property to its owners *after* the creditors had individually or through a reorganization committee provided for the debts of the concern. No precedent has been cited, or is known to counsel, for action even distantly resembling that of the Court now complained of, *previous* to any agreement of the creditors.

That such intervention may be mischievious not only because of its adjudication *obiter* of important questions, but because of its influence upon the creditors and the public generally has been recognized by the very Circuit Court sought herein to be prohibited (7 Fed. Rep., 381), where McKENNAN, J., denies an application on behalf of the company to be relieved of the injunction contained in the order appointing Receivers in a matter relating to an election of president and managers. The learned Judge evidently approved the opinion of

the Masters, one of whom was the present learned circuit judge himself, who says at page 385:

"It was greatly urged upon us that, inasmuch as an injunction against the company had ordered it and its officers to do no act which the Board of Managers, being in doubt as to their right, in view of that injunction to perform certain acts, should apply to the Court from which the writ had issued for leave and instruction; and upon this ground also the claim of jurisdiction in the Court was strongly pressed. In this connection our attention was called to the fact that the petition does not aver that the permission of the Court, which is now asked, is necessary, but merely that it is proper that it should be obtained. We do not think that this application has been improperly made, but what should be done by the Court is a different question. The Court may either grant or refuse the authorization for which it is asked, but it may also decline to act at all upon the application; and if we are right in thinking that it is without jurisdiction, the latter, in our opinion, would be the proper course. Although the petition is, in form, that of a party under injunction asking leave to do that which, if done without such leave, he alleges might subject him to punishment for contempt, we cannot shut our eyes to the fact that a serious conflict is at the bottom of the matter, and that the Court, in granting the leave asked, would be virtually deciding a contested question of great magnitude and importance. Therefore it is that we think the Court should not, if of opinion that the thing proposed to be done would not be transgressive of the injunction, grant leave to do it as a thing indifferent, but should, for the reason that the contemplated act is not affected by the injunction, wholly abstain from making any order with respect to it.

"We are of opinion that the petition should be dismissed."

Taylor vs. Phila. & Rdg. R. R. Co., 7 Fed. R., 381.

And the same learned Judge has, in a report by him as Master, upon the application of receivers in another receivership of the same property, viz., Kelsey vs. The Philadelphia and Reading R. R. Co., April 1st, 1885, in an opinion which is not reported, said: "Neither am I satisfied that it is within the province of the Court to intervene for the advancement of the negotiations of the parties in interest for an amicable arrangement of the affairs of the corporation."

XIII.

The writ of prohibition should, therefore, issue to restrain the Court from proceeding with a matter beyond its jurisdiction; and while the writ of prohibition may be held to vacate all previous action taken in the same proceeding, it is necessary that further orders, upon the issue of the writ, should be made by the Court in order to restore the parties to the position originally held by them prior to the commission of the injury, viz., the entering of the decree complained of. A writ of mandamus also should, therefore, issue to said Court directing it to bring before it the parties to its contract, and there provide for a return to the owners of the securities deposited with the Olcott Committee, as hereinabove detailed, or to enter an order restraining the said committee from using said deposited securities either to institute or to threaten to institute foreclosure proceedings.

Or, if this Court determines that the Circuit Court of the United States has jurisdiction to make the contract and to enter the decree complained of, a mandamus should issue to compel it to exercise its functions of hearing the cause, and of proceeding thereon according to the rules and forms of law by permitting proper and appropriate pleadings and directing a reference to a Master to ascertain the pertinent facts, and thereon to make a determination of the merits, and a decree absolute, and not contingent upon the action of any other person or party whatsoever.

All of which is respectfully submitted.

NATHAN BIJUR,
Of Counsel.

15-596

IN THE

Supreme Court of the United States.

Ex parte Isaac L. Rice.

SUR **MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND A WRIT OF MANDAMUS.**

THOMAS HART, Jr.,
SAMUEL DICKSON,
For the Philadelphia and Reading Railroad Company and its Receivers.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

Ex parte *ISAAC L. RICE.*

Sur Motion for leave to file a Petition for a Writ of Prohibition and a Writ of Mandamus.

A brief statement of the essential facts will make clear the nature and character of the present application.

Upon a bill filed by a mortgage creditor, February 20th, 1893, the Circuit Court for the Eastern District of Pennsylvania appointed Receivers of the Philadelphia and Reading Railroad and Philadelphia and Reading Coal and Iron Companies.

Upon July 6th, 1893, leave was granted to make an issue of Receivers' certificates for the purpose of paying wages and other preferred claims.

Upon December 12th, 1893, the present applicant filed a petition, relating directly and indirectly to the administration of the Receivers.

A reference having been made of certain allegations, proceedings were had before the Master, who reported that the petition should be dismissed.

To this report the petitioner filed two hundred and eighteen exceptions, which are set for argument upon December 4th, 1894.

Upon September 25th, 1894, the Receivers and the corporation filed a joint petition, praying that the Receivers might be authorized, and the company permitted, to enter into an

agreement with a committee of creditors to co-operate, so far as necessary, in carrying into effect a plan for the readjustment of the affairs of the two companies, in case a sufficient proportion of the stockholders and bondholders should become parties to the plan to lead the board of managers of the Philadelphia and Reading Railroad Company and the committee to declare the plan effective.

For the purposes of this petition, it will suffice to say that the plan of readjustment provides for the purchase of ten overdue and maturing coupons of the general mortgage bonds of the Philadelphia and Reading Railroad Company, and an extension of the time of payment for ten years from the date of each purchase; and for the sale of $10,000,000 five per cent. collateral trust bonds to the stockholders and junior bondholders of the company, at par. For the relief of stockholders and bondholders of the company, unable or unwilling to purchase the bonds at par, they are given the privilege of making a cash contribution by way of gift of $3,000,000 (substantially equivalent to three per centum upon the par value of their holdings), and in that event a syndicate has been formed to take and pay for the bonds the sum of $7,000,000. In case the plan should become effective, and only upon that condition, the Receivers are to pay the purchasers of the coupons, who are to extend them for a term of ten years, a commission of two and a half per cent., and to the purchasers of the collateral trust bonds a like commission of two and a half per cent. The net result of the plan, if carried into effect, will be that the company will obtain an extension upon its general mortgage bonds for ten years, and sell $10,000,000 of its collateral trust bonds at par: for it will not affect the net result whether the stockholders and junior security holders purchase and pay for the bonds themselves at par, or if the syndicate take them at seventy per cent., if the stockholders and junior bondholders pay the remaining thirty per cent. as a cash donation.

Upon the filing of the petition, the court ordered that it should be heard upon the fifteenth day of October, 1892, at

10 o'clock A. M., and that notice of the hearing should be given by advertisement in newspapers published in New York and Philadelphia, and in the London *Times*. At the time appointed the hearing was begun, but it could not be completed, owing to the calling of the trial lists; and the court suggested, in view of the fact that certain counsel were in attendance from the city of New York, that the arguments might proceed before the Master, who should report them to the court, whereupon the matter would be considered and disposed of, at chambers, without further loss of time. To this all the counsel present, including counsel for the petitioner, assented; but, upon the coming in of the report, application was made for a further hearing, which was denied, and the report of the Master confirmed, and the requisite permission and authority accorded, as prayed for in the petition.

It is apparent that the question submitted to the Circuit Court merely involved the administration of the assets of the insolvent corporation in the custody of its Receivers. The bill had been filed by a junior bondholder, and in order to protect him and his class from having the mortgaged property foreclosed, under a prior lien, the court authorized the Receivers to agree to pay a commission of two and a half per centum to the purchasers of such prior mortgage interest, in consideration of their postponing the time of payment for ten years. The proposed agreement to extend the time of payment of the coupons will add nothing to the indebtedness of the company, as they are to be paid in case the earnings are sufficient to pay them; and if the earnings should be insufficient, they constitute, by the terms of the mortgage, a prior lien until paid. Whether any, and what, commission should be paid to a creditor for indulgence is surely a question to be determined by the Receivers and managers of an insolvent corporation, under the supervision of the court having possession through its Receivers of the assets of the corporation.

The Receivers are further authorized to pay a commission of two and a half per centum to a syndicate agreeing to purchase $10,000,000 five per cent. collateral trust

bonds and to pay $7,000,000 therefor, in case the stockholders and junior bondholders do not purchase them at par, but elect to make a cash contribution of $3,000,000 for the relief of the company. Assuredly this, too, involves a business question to be decided by the Receivers and managers, under the supervision of the court.

It is a further term of the agreement that the money thus obtained is to be applied to the payment of the Receivers' certificates and secured floating debt, and on account of car trust certificates and equipment notes, all of which must be provided for, even if foreclosure is to take place.

It thus appears that the only intervention of the court has been to authorize, in addition to the payment of interest upon the extended coupons, the payment of one commission in consideration of a credit of ten years upon a prior indebtedness, and of a second commission as a means of securing a large cash contribution for the payment of debts, which are either a first charge upon all the property of the company or secured by the pledge of property not included in the mortgages, and the reason for such intervention is this: If the Reading companies were to be restored to solvency upon the plan becoming effective, it would not be necessary for the Receivers to stipulate to pay these commissions, but as liabilities will still remain, which will have to be dealt with before the Receivers can be discharged, it was essential that the Receivers should agree to make the payments accruing during their administration, as otherwise the advances could not have been secured.

That the action of the court was wise and judicious is made manifest in the report of the Master and the opinon of Judge Dallas; but if the action taken was within the discretion of the court, it is immaterial whether the court acted wisely or unwisely. It could not be reviewed, even upon appeal; but the present application is for the allowance of writs, which are not available for the purposes of appeal. Neither the writ of prohibition nor the writ of *mandamus* can be so used.

The petitioner prays, *first*, for a writ of prohibition to pro-

hibit the circuit judge from further proceeding upon the petition of the Receivers, and from enforcing or carrying out the decree thereunder.

A copy of the docket entries is annexed as Exhibit A, which shows that the court has fully and finally acted both upon the original petition of the Receivers and the company, and upon the petition for vacation of the decree.

If the court had the power to issue the writ of prohibition to the Circuit Court it could not do so, as the court below has acted (United States *vs.* Hoffman, 4 Wallace, 158); but it has been repeatedly decided that the thirteenth section of the Judiciary Act (79 Revised Stat., section 688) is the charter of its power in respect of this writ. It is only necessary to refer by name to the familiar cases:—

Ex parte Christy, 3 How., 292, 322;
Ex parte Gordon, 1 Black, 503, 505;
Ex parte Graham, 10 Wall., 541;
Ex parte Warmouth, 17 Wall., 64;
Ex parte Pennsylvania, 109 U. S., 74.

The answer to the application for the writ of *mandamus* is equally easy and conclusive. The purpose of the writ is said to be:—

Either, to command the judge to cause the securities deposited under the plan to be returned to their owners, and to restore the parties to their original positions;

Or, to vacate the decree and to require the parties in interest to be brought in, and thereafter to proceed according to the rules and forms of law.

The obvious and sufficient objection to the first prayer is that it asks that the Circuit Court shall be commanded to adjudicate upon the rights of parties not before it. The stockholders and bondholders who have given their assent to the plan, and the purchasers of the coupons, have vested rights of which they cannot be deprived without a hearing.

The essential condition of the alternative prayer is that the court should vacate the decree, or, in other words, treat this

application as an appeal for a review of the action of the Circuit Court upon its merits; while the object for which the writ is to be directed, if this court could, in this proceeding, vacate the decree—viz., to command the circuit judge to proceed according to the rules and forms of law for such cases made and provided—is not one for which the writ can issue, as the record shows that the court has already proceeded according to the rules and forms of law and rendered a decision.

The sixteenth specification of the petition avers—

"That the proceedings wherein said decree or contract of said court was made were irregular, inasmuch as said court delegated to a Master its function of hearing and determining the issues raised; and that the manner of proceeding thereon generally, and without allowing the filing of or argument upon exceptions, and without the parties in interest before it, and declaring that said plan 'sanctions the raising of money by rightful means, upon reasonable terms, and for proper objects,' without permitting evidence to be taken, constitutes a summary proceeding, depriving your petitioner of his rights and property without due process of law."

The circumstances under which the special reference was made to the Master are succinctly stated in the opinion of the court, and are substantially admitted in the petition, and have already been alluded to. In fact the reference was a special reference to the Master as a *locum tenens*, in this particular matter, *pro hâc vice*, for the accommodation of counsel, and particularly in relief of the counsel for the petitioner and another gentleman from New York. But it was not made adversely nor arbitrarily. It was submitted to the counsel engaged, all of whom were then before the court, and it was by all of them, including the counsel for the petitioner, assented to and accepted. The arrangement was expressly made for the convenience of counsel, in order that the court might act upon the report of the Master and of the arguments of counsel at chambers, and all, including counsel for the petitioner, became parties to the arrangement and appeared before the Master, and took part in the pro-

tracted arguments before him. These arguments were reported stenographically, and the reports transmitted by the Master to the judge for his consideration. The basis of this application, therefore, plainly stated, is: That the Supreme Court of the United States shall issue the high writ of *mandamus*, to order a judge of the Circuit Court to listen to an attorney in person, who had entered into an agreement, in open court, with the judge and with the opposing counsel, which agreement had been suggested for his special accommodation, that the argument should be delivered before the Master to be by him reported to the court for its consideration and action.

It is manifestly proper that such an order, as was made upon the petition of the Receivers, should be made advisedly, after notice to the parties in interest; but neither the petitioner nor the other creditors, represented before the court, are parties to the record, and it would be entirely competent for the court to make the order *ex parte*. In this case, however, after full notice by advertisement in this country and abroad, and ample opportunity given for the presentation of of all possible objections, the court being fully advised in the premises, decided the questions involved, and made a final order granting the prayer of the petition. This appears upon the face of the papers, and no further answer is necessary.

The very recent case of *In re* Parsons, 150 U.S., 150, grew out of orders made by the Circuit Court touching the possession of certain books and papers, and the custody of certain prisoners, which orders involved incidentally the recognition of certain persons as United States Attorney and Marshal. It was objected by the former incumbents that the order, in fact, deprived them of their offices, and that the proceeding should have been by *quo warranto;* but in denying the application the Chief Justice said:—

"If the orders be regarded merely as directions in the administration of judicial affairs in respect of the immediate possession of property or custody of prisoners, we cannot be properly called on, by reason of anything appearing on

these records, in the exercise of appellate jurisdiction in this manner, to direct them to be set aside. And if the proceedings should be treated as involving a final determination as on issue joined of the right to such possession and custody, there was no complaint of want of notice or of hearing, and the summary mode adopted did not in itself affect the jurisdiction of the Circuit Court upon the ground that it had exceeded its powers. Without intending to intimate that the orders would have any effect, and if so, what, on appropriate proceedings to try title to these offices, it is enough that in our judgment the Circuit Court had jurisdiction to enter them. We cannot by writ of *mandamus* compel the court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction. *Ex parte* Flippin, 94 U. S., 348; *Ex parte* Burtis, 103 U. S., 238; *In re* Morrison, 147 U. S., 14, 26; *In re* Hawkins, Petitioner, 147 U. S., 486, 490; American Construction Co. *vs.* Jacksonville, Tampa, &c., Railway Co., 148 U. S., 372, 379, 386; *In re* Humes, Petitioner, 149 U. S., 192."

It is submitted, therefore, that leave to file the petition should be denied.

THOMAS HART, JR.,
SAMUEL DICKSON,
For the Philadelphia and Reading Railroad Company and its Receivers.

DECEMBER 1st, 1894.

APPENDIX.

EXHIBIT A.

CIRCUIT COURT OF THE UNITED STATES EASTERN DISTRICT OF PENNSYLNANIA.

Thomas C. Platt	April Sessions 1893.
vs.	No. 1.
The Philadelphia and Reading Railroad Company et al.	In Equity.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

I, Samuel Bell, Clerk of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, *Do hereby certify* that the following are all the Docket Entries in the above entitled cause relating to the proceedings under the petition of the Receivers of the Philadelphia and Reading Railroad Company in reference to the Proposed plan of re-adjustment filed September 25, 1894, including the petition of Nathan Bijur Esq. for correction of record, &c. and of Isaac L. Rice for vacation of decree and show the nature and character of all the proceedings of the Court in reference thereto.

DOCKET ENTRIES.

1894.	September	25.	Petition of Receivers of the Philadelphia and Reading Railroad Company *et al.* in reference to proposed plan of re-adjustment filed.
"	October	15.	Argued on petition of Receivers in reference to proposed plan of re-adjustment.
"	"	"	Petition referred to the Master (see minutes).

1894.	October	23.	43d Report of the Master *sur* petition of Receivers and Railroad Co. filed September 25, 1894, for authority to enter into agreement for partial re-adjustment of the affairs of the Cos. and make the payments provided for if the plan be effected filed.
"	"	29.	Opinion (by Dallas, Cir. J.) filed ordering decree as recommended by Master in 43d Report, to be entered as the decree of the Court.
"	"	"	Decree as recommended by Master *sur* 43d Report entered (see decree on file and in minutes).
"	November	9.	Petition of Nathan Bijur Esq. of counsel for correction of record and entry of appearance for Isaac L. Rice an intervening petitioner and Hetty H. R. Green, holders of income mortgage bonds and for Richard B. Hartshorne, Henry T. Carey and Jacob Scholle a committee of holders of such preference income mortgage bonds.
"	"	"	Petition of Isaac L. Rice for vacation of decree of October 29th, 1894 and other relief filed.
"	"	"	Argued on Petition of Isaac L. Rice.
"	"	"	Prayer of petition refused.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Twenty-second day of November in the year of our Lord one thousand eight Hundred and ninety-four and of the Independence of the United States the 119th.

SAMUEL BELL
Clerk of C. C.

[SEAL]

EXHIBIT B.

COPY OF MINUTES ADOPTED AT MEETING OF BOARD OF MANAGERS SEPTEMBER 22, 1894.

Present—Messrs. Harris, President, Antelo, Boyd, Sinnott and Welsh.

The President stated that the meeting had been called to consider the proposed plan of reorganization, which had been prepared by a committee of which Mr. F. P. Olcott is the chairman. The following is a copy of the plan:—

[Here follows Copy of Plan.]

Mr. Samuel Dickson, of counsel, gave an explanation of the negotiations which had led to the making of the proposed plan, and submitted a draft of a proposed letter from the Committee, and a draft of a reply thereto on behalf of the Receivers and the Company; also a draft of a proposed agreement between the Receivers, the Philadelphia and Reading Railroad Company and the Committee, together with a petition by the Receivers and the Company to the United States Circuit Court, of which documents the following are copies:—

[Here follow Copies of above Papers.]

After full consideration, upon motion, duly seconded, it was unanimously *Resolved:*

1. That the draft of the reply to the letter of the Committee be approved.

2. That the petition to the Circuit Court of the United States, on behalf of the Company, be approved.

3. That the proposed agreement between the Receivers and the Company of the first part, and F. P. Olcott and others, committee, of the second part, be approved, and that the officers of the Company be authorized to execute and deliver the said agreement on behalf of the Company.

Resolved, that this Company will pay the interest upon the coupons, and registered interest, of the General Mortgage bonds, and retire the purchased coupons at 105 and accrued interest, and will sell its Five per cent. Collateral Trust gold bonds, and pay the guarantee commissions of 2½% to the syndicates purchasing the General Mortgage interest and the Collateral Trust bonds, as stipulated in the agreement aforesaid.

Attest

WM. R. TAYLOR,
Secretary.